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This study examines the legal authority of military police to conduct law enforcement activities in relation to civilians at military installations in the United States. The examination focuses on the lack of statutory arrest power and the legal rationales of citizen's arrest, protection of government property, and an installation commander's authority to maintain law and order.

The study establishes that the lack of statutory arrest power is a product of the historical notion that military personnel ought not to execute laws against civilians. Further, the legal rationales used to support current police operations are inappropriate because they provide little guidance to military police; they are neither legally or logically sound; and, they do not provide for effective criminal prosecutions, because they permit military police violations of civilians' constitutional rights and unwarrented tort litigation.

The study concludes by proposing statutory language providing military police law enforcement authority. The proposal satisfies current notions of appropriate civil-military relationships. It also permits effective and uniform law enforcement at military installations by providing specific guidance to military police thereby avoiding violations of the Bill of Rights with concommitant civil and criminal litigation.

MILITARY POLICE AUTHORITY OVER CIVILIANS-- THEY LOOK LIKE POLICE, THEY ACT LIKE POLICE, BUT ARE THEY POLICE?

A thesis presented to the Faculty of the U.S. Army Command and General Staff College in partial fulfillment of the requirements for the degree

MASTER OF MILITARY ART AND SCIENCE

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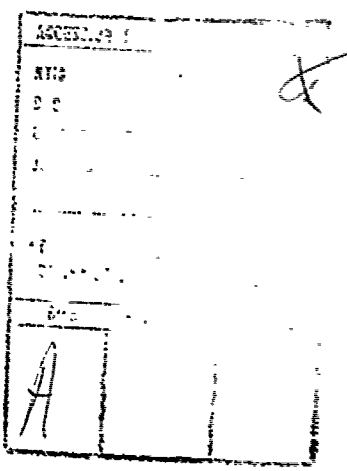

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CHAPTER I

INTRODUCTION

The Department of Army has recently revised its Field Manuals designed to guide military police in lawfully conducting law enforcement activities.[1] These manuals[2] provide detailed guidance and information on all phases of law enforcement, including arrest, seizure of evidence, and the use of force to effect an arrest or the search and seizure of property.[3] A striking feature of these manuals is that they provide military police with little guidance in conducting law enforcement activities involving civilian criminal offenders at military installations. Rather, the manuals are limited to police activity involving suspected criminal offenders subject to the Uniform Code of Military Justice[4] or to law enforcement at military installations when the status of the criminal offender is unknown.

There are no manuals specifically providing military police detailed guidance for conducting law enforcement activities involving civilian offenders. In fact the existing manuals urge military police to seek guidance from a judge advocate at anytime they face taking some action in response to civilian misconduct.[5] Unfortunately, a judge advocate, who is requested by military police to render advice and guidance, has no ready source of information on lawful military police conduct in situations where a suspected criminal offender at a military installation is a civilian. The judge advocate cannot seek information

from legal scholars because none have, as yet, written a comprehensive treatment of military police authority over civilians. Further, there is little information in opinions of courts because few cases have addressed the authority of military police in civilian law enforcement. The reasons for this lack of ready information are many and complex.

First, unlike the situation involving military criminal offenders, neither Congress nor the Executive has articulated in a statute or regulation the nature and extent of authority military police may exercise over civilians generally, or even at a particular military installation. Secondly, litigation by civilians challenging military police law enforcement conduct has been rare,[6] and what few cases there have been, have not addressed the entire range of law enforcement activity that courts have faced in litigation involving military offenders.[7] Thus, unlike the situation of military offenders,[8] manual drafters have neither a governmental standard nor sufficient numbers of court opinions to use as a basis for drafting a manual to guide military police in their relations with civilians.

A third reason why there is a lack of references for judge advocates who advise military police is that legal scholars and the Judge Advocates General of the Armed Services use two different legal rationales[9] to explain the extent of military police authority over civilians. However, these rationales have not been extensively analyzed in terms of the full range of military police law enforcement. To date there is no comprehensive legal treatise or other scholarly work on the subject of military police power over civilians.

Finally, in the absence of Congressional action, service regulations suggest that military police may have only the authority of

ordinary citizens to engage in law enforcement against other citizens.[10] The difficulty with this approach is that each state has established different rules for civilian law enforcement and there is no general compilation of all the rules which could be used as a ready reference by judge advocates.[11] Determining what guidance to give military police at a particular military post is further complicated by the fact that many states have still not clearly delineated particular rules for arrest or search and seizure of property by citizens.[12] Thus the judge advocate often finds himself engaged in fruitless research for non-existent guidance.

One purpose of this paper is to provide judge advocates with a comprehensive examination of existing rules of law governing military police law enforcement activities in relation to civilians. This examination reveals that the lack of a Congressional statute providing uniform guidance to military police engaged in the function of law enforcement involving civilian criminal offenders is a product of the evolution of the tradition of civil supremacy over United States Armed Forces. Secondly, an examination of uniformed police law enforcement both in our common-law legal tradition and as prescribed in American jurisprudence reveals two salient facts: (1) that the historical causes for governmental restrictions on law enforcement by the Armed Forces against civilian criminal offenders no longer support Congressional reluctance to grant military police law enforcement authority over civilians at military installations in the United States; and (2) the complexity of current legal rules governing lawful arrest, search and seizures of property and the use of force to accomplish these tasks demands Congressional action to quantify and delimit by specific statute the authority of

military police over civilian criminal offenders at military posts. Finally, statutory and regulatory language will be proposed that will provide appropriate guidance to military police. The proposals will insure that law and order are maintained at military installations while at the same time each citizen's constitutional rights are protected when visiting, working, or living on military installations.

CHAPTER II

HISTORICAL CAUSES FOR THE LACK OF A STATUTORY BASE FOR MILITARY POLICE LAW ENFORCEMENT AUTHORITY OVER CIVILIANS

Congressional reluctance to enact a statute spelling out the nature and extent of military police authority over civilians is a product of history. The seeds of this inaction were sown in early English history and nurtured by incidents occurring early in our own history. A review of the development of the exercise of police power by governments in England and the United States reveals a reluctance on the part of legislatures and courts to grant uniformed executive agents, particularly in the military, extensive authority to invade a citizen's privacy or restrict his liberty.

Uniformed Police Forces

British Experience

Until the mid-nineteenth century, a uniformed law enforcement agent was unknown in common-law England. From the days of the Norman Conquest, law enforcement, including both the restriction of liberty before trial and the investigation of facts as evidence for trial, was left to citizens themselves.[13] While the King appointed sheriffs to keep the peace and collect taxes, citizens were expected to report criminals and respond to the sheriff with assistance--called a posse comitatus.[14] Law enforcement was the duty of each citizen, not a function of a uniformed police force.

The rules of law governing such matters as when a person could be arrested by another citizen, what force could be used to accomplish an arrest, and what remedies were available to persons who were falsely arrested or assaulted, were fashioned jointly, by the civil courts in response to complaints of citizens that they had been falsely arrested,[15] and by the criminal courts in cases brought before them.[16] The rules established by these courts were often conflicting because the judges and the courts themselves sometimes were given authority by the King, and sometimes by Parliament. Jurisdiction of the courts overlapped. Some legal scholars describe this judicial system as one that was so complex that meaningful criminal justice was impossible.[17]

The complexity of the judicial system[18] together with crowded dockets resulted in long delays before offenders could appear before a court for trial of their case. Meanwhile, accused criminals often languished in crowded jails in what has been described as sub-human conditions.[19] For the poor and the illiterate, who were unable to afford legal counsel, obtaining a monetary remedy in a civil court against those who may have falsely arrested them, was a remedy more theoretical than real.[20] Because of this complex judicial system and the rules of law it fashioned, law enforcement by civilians proved particularly ineffective. As people crowded into cities in search of jobs during the industrial revolution,[21] city property owners turned to the hiring of night watchmen. The night watchmen either scared off prospective criminals or through the "hue and cry" called out the citizenry to assist in capturing and arresting alleged offenders.[22]

The employment of night watchmen had an effect on the common-law courts' view of situations in which a criminal offender could be forcibly

arrested. For example, courts would provide a tort remedy to a person who, when subsequently acquitted, had been arrested and incarcerated for an offense committed out of the presence of the citizen who laid hold of him.[23] These same courts denied this remedy when a watchman was the one who effected the arrest based on a report of a citizen of a crime not committed in the presence of the watchman.[24] Although the night watchman was not a governmental agent, courts were willing, as a pragmatic matter, to clothe these night watchmen with a measure of protection against potential tort liability. This approach provided a legal basis for the later action of Parliament and the courts granting uniformed police forces greater authority in conducting law enforcement activity than that permitted civilians.[25]

Uniformed police forces first made their appearance in 1829 as a result of the efforts of Sir Robert Peel, a member of Parliament. He persuaded his colleagues that urban crime was increasing at a rate that required full-time law enforcement agents who could be trained to investigate crimes with an understanding of the complex rules of criminal procedure and evidence that had been developed by the courts.[26] Parliament established the "Bobbies" (named for the proponent of the force) and by statute authorized them to arrest criminal offenders in the city of London, whether the crime was committed in their presence or reported to them.[27] However, the courts retained the common law concept of citizens' arrest, redefining it to conform with the continuing redefinition of police powers by both Parliament and the courts themselves.[28] Common-law doctrine finally evolved to provide that citizens could arrest when a serious crime was committed in their presence, while the police could arrest for crimes whether committed in their presence or reported to them.[29]

American Experience

Prior to independence, law enforcement in the American colonies was not unlike that in England, as described above. It was also not until late in our history, 1844, that the New York legislature became the first to establish a uniformed full-time police force.[30] Prior to that date New York and the other states had been relying on night watchmen who were authorized by statute but who were appointed by local political representatives or who were volunteer citizens taking turns.[31] Later, the legislatures authorized full-time day police who went home to leave the cities to the care of the night watchmen. The friction between these employed day forces and politically appointed night watchmen in New York City led to the 1844 Act of the New York State Legislature.

Although the types of law enforcement agents in the colonies and later in the United States were similar to those in Britain, the colonial governments and early states used a very different method to create these law enforcement agents than the British Parliament and King. In England the ten-century evolution from law enforcement performed exclusively by citizens, to law enforcement by uniformed police, was marked by struggles between the King and Parliament, and between the common law courts and both the Monarch and the Parliament.[32] Unlike continental European legal systems, the British were slow to codify rules of criminal procedures and descriptions of crimes because of the fluctuations of power among the King, Parliament and the courts.

In the early American colonies, on the other hand, codification of laws occurred from the earliest times.[33] As the first settlers arrived on our shores, they were armed with Royal Charters which specifically iterated rules of conduct for them. Additionally, most colonists

were members of organized churches. These churches carefully codified rules of behavior for their members.[34] It was natural for the colonial governments, composed of these church members, to codify rules of conduct as needed.[35] Thus, even the American night watchmen, the sheriffs and day-police were all established by statutes enacted by local legislative bodies. This practice is reflected even in later 17th and 18th century America by the curious practice of the state and territorial legislatures codifying rules of procedure for vigilante's and other citizen and private police forces.[36] For example, a vigilante system in Pennsylvania was not abandoned until 1833 upon repeal of a statute expressly providing for them.[37]

Thus, from our earliest history we maintained the tradition that a legislative body, representing the people as a whole, was to control the executive and judicial authority in matters of criminal justice.[38] The tradition was given impetus during the time of the Revolutionary War by the English Monarch's practice of enforcing with military troops the pronouncements of the English Parliament and the proclamations of Colonial Governors.[39] The American colonists viewed the use of military troops to enforce civil law as an abuse of governmental power. Control of unbridled power in the Executive or Judicial branches of Government became a prime concern of the new nation.[40]

After the Revolutionary War, early colonial courts recognized statutory law as the basis for reviewing cases and controversies. These courts appreciated the need for a counter-balance to their own adjudicatory rule-making powers and the power wielded by executive agents of the state. As noted by one legal historian:

> . . . countervailing power, one of the great themes of American History, was particularly strong in criminal justice.

> . . . At least in legal theory, criminal trials were hedged about by many safeguards. A stern law of evidence, juries and meticulous attention to procedure were thought to be essential to protect the life and liberty of the citizen. . . . The picture that emerged was one of precision, rigidity, care. Crimes were only those acts clearly engraved in the statute books. Laws were to be strictly construed.[41] (Emphasis added.)

In accordance with this legal tradition all states and the Congress have today by statute established police forces and clearly delineated the circumstances under which criminal offenders may be arrested.[42]

The courts use these statutes to determine whether police conduct is lawful or unlawful in cases where a citizen alleges that he was unlawfully arrested or that he was subject to an unconstitutional search and seizure.[43] These same courts find no Federal statute to use as a standard to determine whether military police arrests or searches and seizures of civilians on military posts are lawful. Congress has not denominated military police as a class of persons who can arrest civilian criminal offenders, even for crimes perpetrated on military installations and which are "engraved in (Federal) statute books."[44] Two separate historical facts explain this inaction by Congress.

Factors Causing Congress to Withhold Civilian Law Enforcement Authority From Military Police

Loss of Court-Martial Jurisdiction Over Civilians

British troops accompanied the colonists to America to protect England's interests in her new territories from incursions by her European competitors, principally France and Spain, and from Indian raids.[45] However, as the colonists became more violent in their refusal to pay taxes to the crown, British troops became a de facto

uniformed law enforcement agency. The soldiers and their collaborators often seized persons and either jailed them without trial, jailed them awaiting court-martial, or interned them for purposes of staffing the crews of British ships.[46] Serious infractions of the early charters or rules of colonial legislatures or orders of the King and the British Parliament were often dealt with as court-martial offenses.

The utilization of British troops as police[47] during Revolutionary times was based on authority contained in the Mutiny Act of 1689.[48] The Mutiny Act ratified these Articles of War and permitted Parliament to exercise control over the Army by its power to repeal or amend the Articles in whole or in part. It is not clear that the Articles of War of this time specifically permitted the court-martial of civilian workers. However, suttlers, servants, and camp followers were in fact tried by court-martial.[49]

Colonial governments looked to the British practice of court-martial of civilians and codified it in statutes establishing their own militias. As early as 1775, the Provisional Congress of Massachusetts adopted Articles of War which included provisions authorizing court-martial for ". . . sellers and retailers, and all persons whatsoever serving with the . . . Army in the field."[50] The first Articles of War adopted by the Continental Congress in 1776 contained similar language and courts-martial of civilians throughout our early history were common.[51] A provision containing similar language was continually enacted in each version of the Articles of War. The phrase "serving with the . . . Army in the field" was intended to prevent courts-martial of civilians as a routine law enforcement matter when civilian government was in operation.[52] It limited court-martial jurisdiction to the trial

of civilians, who were actually out with the Army in areas where courts were unavailable or where the crime impacted directly on the discipline or performance of the Army's mission.[53]

The trial of civilians in military courts was challenged in 1872 in the famous case of Ex Parte Miligan,[54] in which the Supreme Court ruled that a civilian could not be tried by court-martial under the Articles of War, if civilian courts were open and operating. Because Congress had already provided Federal courts for the territories,[55] the effect of the Miligan case was to prohibit courts-martial of civilians anywhere in the United States or its territories except where, in time of war or emergency, the civilian courts would be closed.

A significant side-effect of the Miligan holding was the withdrawal of statutory authority for soldiers to perform law enforcement activities against civilians. Jurisdiction and authority to conduct law enforcement activities flows from the jurisdiction of a criminal court as established by the state legislature or Congress.[56] The Articles of War authorized officers, non-commissioned officers, and soldiers on guard duty to apprehend and arrest civilians at military posts for violations of the Articles of War and crimes enacted by Congress. In Miligan, the Supreme Court ruled that civilians were not subject to the Articles of War when civilian courts were available. Thus, by removing the jurisdiction over civilians from courts-martial, Miligan removed the statutory jurisdiction the military had exercised under the Articles of War to conduct law enforcement activities in relation to civilians. That Congress did not act to fill this void was due to a second historical circumstance.

Prohibitions Against Execution of Civil Laws by Soldiers

The second historical circumstance explaining Congressional inaction in providing military police statutory law enforcement powers over civilians concerns the misuse of the Army to execute civilian laws. From 1789 U.S. Marshals or state and local sheriffs accomplished law enforcement involving civilian criminal offenders.[57] A civilian criminal offender at a military post would be apprehended and held by the military until the arrival of a marshal or state police who would incarcerate the civilian until trial. It was also not unusual for soldiers to be called by a U.S. Marshal or other law enforcement official to assist in the off-post search for and arrest of a criminal or fugitive being sought for crimes committed in the civilian community.[58] This practice was a continuation of a similar one, noted above, in early common law England, where the sheriffs and night watchmen would call out civilians to assist them by forming a posse comitatus.[59] As U.S. Marshals were few in number, they frequently called upon the Army to form a posse comitatus to assist in maintaining law and order in the Federal territories and those areas within the states where settlements were few in number and widespread.

As time progressed, the utilization of the Army to assist in the execution of civilian law became more frequent, reaching a peak during and just after the Civil War.[60] The desirability of using the Army is understandable. Army units were disciplined, trained in the use of weapons and horses, and capable of logistically supporting themselves--factors not usually found in civilian posses.[61]

However, the over-utilization of the Army as a law enforcement agency to assist in the reconstruction of the South after the Civil War led to Congressional action banning use of the Army to execute civil law.[62] Because "carpetbaggers" from the North used the Army to assist them in obtaining control of city and state governments, citizens demanded Congress take some action. Debate and criticism of the use of the Army for law enforcement was as heated and vitriolic in Congress after the Civil War as had been the debate by colonial legislators who abhored the heavy-handed use and actions of the British troops to enforce civil law during the Revolutionary War period.[63]

As a result, Congress in 1878 enacted the Possee Comitatus Act which, as amended, provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.[64]

Passage of the Act did more than halt the use of soldiers as police; it was a clear expression by Congress of the reaffirmation of the principle that military power will not be used as an instrument of governmental police power over civilians. Since the decision of Ex Parte Miligan[65] was coincident in time with the debate and passage of the Posse Comitatus Act, two branches of government, Judiciary and Legislature, concurrently indicated intolerance for the subjection of civilians to law enforcement by soldiers. Thus, even though the Miligan decision left a gap in law enforcement on military installations, it was unlikely that a bill providing for law enforcement by soldiers even on military installations would be successful in Congress, or if passed, would muster constitutional test in the courts. Only a foolhardy

Congressman would introduce a bill to give the Army law enforcement authority over civilians, even if applicable only on military installations. He would be facing his colleagues who were of a mood to severely limit Army contact with civilians--if not to abolish a standing Army altogether.[66]

Finally, even if Congress had perceived a need for legislation, and would have been willing to accept the political consequences of giving police power to the military, there existed no organized police force to whom a grant of authority could be made. Military police, as we know them today, did not exist in the period 1860 to 1880.[67] Commanders maintained law and order on military posts by use of sentinels and guards; a duty assigned to troops under their command.[68] Therefore, assuming a Congressional will to act, either a police force would have to be created, with attendant expense, or a grant of authority would have to be made in a general way to commanders. Again neither of these alternatives would have been attractive to a Congress seeking to cut back the standing Army.

Summary and Conclusions

This short review of British and American History respecting the exercise of police power reveals the reluctance of governments to establish uniformed, para-military police forces. Uniformed police were not established until urbanization accompanying the industrial revolution demanded an effective organization to maintain law and order. In America, the delicate balance created by the United States Constitution and the constitutions of the several states among legislative, executive and judicial branches of government required the legislature to codify criminal substantive and procedural rules. Police forces were created

and the extent of law enforcement authority was strictly stated in statutes. The Army was often used to assist civilian law enforcement agents, but excesses resulted in Congressional prohibitions on using the Army to execute the laws. Concurrently, judicial limitations on courts-martial of civilians had the effect of leaving the Army without statutory basis for law enforcement activities involving civilian criminal offenders at military installations.

For over 100 years, the Army has continued to maintain law and order at posts, camps and stations in the United States. This activity has necessarily included the arrest, seizure of property, and detention of civilians, despite a lack of Congressional authority to do so. These activities have rarely been challenged in the courts by civilians. Those few courts that have reviewed military police law enforcement against civilians at military installations have consistently approved arrests, searches and seizures and use of force by military police.[69] In only one case, United States v. Banks,[70] a court addressed the notion that such military police conduct at military installations is contrary to the American tradition of excluding uniformed military personnel from the exercise of police power in the administration of justice. In Banks, a civilian charged with drug offenses contended that the actions of military police[71] in restraining his liberty and delivering him to civilian law enforcement agents after search and seizure of heroin from his person was unlawful.[72] He contended that the military police conduct was prohibited by the Posse Comitatus Act.[73] The court dismissed the contention ruling that law enforcement in pursuit of a legitimate military purpose, that is, maintenance of law and order at a military installation, is not prohibited by the Posse Comitatus Act.[74]

The Banks holding properly places the American tradition of excluding military personnel from execution of the civil laws in perspective. Using military police to apprehend civilians in the civilian community for alleged crimes is contrary to our notion of civil-military relations.[75] However, permitting military police to arrest, search and seize evidence, and use force to accomplish these ends at military installations fulfills a necessary governmental purpose: making a military installation a safe place to live, work and visit--a necessary condition precedent to accomplishment of the governmental function.[76] Thus, there would be no historical or political objection to Congress enacting a statute granting military police authority to conduct law enforcement against civilians at military installations.

The inquiry cannot, however, stop with the conclusion that traditional notions of civil-military relations would permit law enforcement against civilians at military installations. One must question whether the methods the military police use properly avoid the heavy-handed invasions of citizens' rights and liberties which the traditional civil-military relations theory sought to avoid. In seeking to answer this question, one must inquire as to the scope of authority the military police currently exercise. Since there is no statute describing military police as a class of persons who can exercise police powers over civilians, three different legal theories of military police authority have developed. An examination of these legal rationales plainly reveals they are so complex and limited in scope that current law enforcement practices not only place a citizen's constitutional rights in jeopardy but also fail to properly maintain that state of law and order required for the governmental functions at military installations to be accomplished.

CHAPTER III

CURRENT LEGAL THEORIES JUSTIFYING LAW ENFORCEMENT AT MILITARY INSTALLATIONS IN THE UNITED STATES

The purpose of this chapter is to examine the jurisdiction to perform law enforcement at military installations and how the function is performed in accordance with agreements made between law enforcement agencies. In the absence of a statute designating military police as a class of government agents who are authorized to arrest civilian criminal offenders at military installations, law enforcement is a responsibility shared by state and Federal law enforcement agencies pursuant to statutes, and by commanders pursuant to regulations.[77] Which of these officials actually will perform the law enforcement function at a given time and at a given place on an installation will depend upon a complex jurisdictional system and agreements between federal and state governmental agencies.

Law Enforcement Jurisdiction

All citizens in the United States are always subject to two distinct criminal justice systems, one administered by a state government and one by the federal government. By virtue of the Tenth Amendment to the Constitution, general police powers are exercised by state governments. Thus, maintenance of law and order in our cities and towns is the responsibility of state and local legislatures. They enact statutes

and ordinances describing substantive crimes and criminal procedures designed to effectively investigate and adjudicate alleged criminal acts.[78] On the other hand, pursuant to the enumerated powers in the U.S. Constitution, Congress has also enacted legislation describing substantive crimes and criminal procedure designed to protect federal property and insure orderly accomplishment of federal functions.[79]

Citizens who visit, work, or live on military installations face a unique jurisdictional arrangement between the federal and state governments with respect to the responsibility for administration of criminal justice. By virtue of Article I, Section 8, Clause 17 of the Constitution, the United States often acquires the criminal jurisdiction the state would ordinarily exercise over land areas that are used as military posts, camps and stations. This Constitutional arrangement is known as legislative jurisdiction. It was established by the framers of the Constitution in response to an incident that occurred just as the Continental Congress was debating what the form of the new federal-state governmental system should be.[80]

An unusual confrontation between the Continental Congress and the Continental Army caused the Congress to consider what type of protection it would need to insure that its deliberations would be free from interference. For a four-day period in June 1783, the soldiers of the Continental Army, who had not been paid, left their camp in Lancaster, Pennsylvania, and assembled outside Independence Hall in Philadelphia to demonstrate. Rumors abounded that Congressmen would be seized and held hostage unless the demands for pay were met. When the Governor of Pennsylvania was unwilling to call out his militia, Congress removed itself

to New Jersey.[81] While the removal insured the safety of the Congressmen and the continuation of deliberations without interference, the need to move the site of the Congress was not forgotten by these Congressmen who would later draft the new Constitution.

To insure that such an incident could never again force Congress to move, out of fear for its safety, early drafts of Article I of the Constitution all contained a provision that any area to be established as the seat of the federal government would be a place where only Congress would have the authority to legislate.[82] This provision was designed to prevent any interference by states with the conduct of business by the federal government and to enable Congress to provide for its own protection.[83] For the same reasons, a clause was added in subsequent drafts providing Congress like exclusive legislative authority:

> . . . over all places purchased by consent of the Legislature of the state in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings.[84]

Because Congress becomes the sole legislative authority for military installations which are acquired in compliance with this clause, law enforcement is the exclusive prerogative of federal law enforcement agents and the federal courts. By giving consent to acquisitions of post, camps and stations, the states give up their sovereignty over these areas and Congress is substituted to provide general municipal legislation including criminal substantive and procedural law.[85]

Congress has enacted a comprehensive body of legislation for the administration of criminal justice in areas over which the United States exercises jurisdiction. Substantive crimes are defined either in specific statutes or in a general statute called The Assimilative

Crimes Act.[86] This statute adopts as federal crimes all existing state descriptions of crimes which are not in conflict with specific federal law. Other statutes authorize law enforcement officials, such as U.S. Marshals[87] and Federal Bureau of Investigation Agents.[88] They have the same statutory authority to make arrests and seize property in these areas of United States jurisdiction, as state law enforcement agents have, who operate within the state's geographic border.

Exclusive Legislative Jurisdiction is not the only type of legislative jurisdiction permitted by the Constitution. The states and the United States can agree to jurisdictional arrangements with respect to military installations and other federal areas that are less than a complete grant of exclusive jurisdiction to the United States.[89] A description of four types of legislative jurisdiction that currently exist at military installations will assist in understanding the complexity of current law enforcement practices against civilian criminal offenders at military installations in the United States.

Exclusive Jurisdiction

The term Exclusive Jurisdiction is used to describe areas where the United States exercises all of the state's power to legislate for the area the United States acquires.[90] Civilian criminal offenders are tried in federal courts for crimes defined by federal statute (including the Assimilative Crimes Act). State police have no authority in the area, even though the installation is entirely within the state's borders. However, because of insufficient numbers of U.S. Marshals and other federal law enforcement agents, routine law enforcement activities are conducted by military police, who lack statutory authority to arrest civilians.[91] By regulation, military police are required to deliver

criminal offenders to federal law enforcement agents as soon as practicable after apprehension.[92]

Concurrent Jurisdiction

Concurrent jurisdiction is the term used to describe areas where both the United States and the state in which the installation is located have full jurisdiction.[93] A civilian criminal offender at a post under concurrent jurisdiction may be subject to trial in federal courts for crimes defined by federal statute (including the Assimilative Crimes Act) or to trial in the state courts for violation of state crimes. Agreements between the U.S. Attorney and the state's chief prosecutorial attorney for the area, delineate which offenses will be tried in the state courts and which will be tried in federal courts.[94] State and local police agents have authority to conduct law enforcement activities on the installation. Typically, state police lack the resources and the inclination to provide complete police coverage of military installations, and commanders are not inclined to permit such because of a fear of mission interference.[95] Again, routine law enforcement is accomplished by military police. Criminal offenders are handed over to either state or federal civilian authorities depending on the type of crime committed and the jurisdictional arrangement established in law enforcement agreements described above.[96]

Partial Jurisdiction

Perhaps the most complicated of jurisdictional arrangements is known as partial jurisdiction. In this situation, the state in which the military installation is located and the United States make agreements as to jurisdiction by dividing responsibility for substantive legal matters.[97] For example, the state may retain its jurisdiction

over civil matters, such as contract, real property or tort law, while the United States acquires exclusive jurisdiction over criminal justice matters. In such a case, criminal law enforcement is handled just as if the United States had Exclusive Legislative Jurisdiction, that is, civilian criminal offenders would be tried in federal courts and would be subject to federal law enforcement agents rather than state police agents.

Another type of Partial Jurisdiction arrangement may occur when the state and the United States agree at the time of acquisition of the land for a military installation that criminal law matters will be subject to the jurisdiction of each of the sovereigns concurrently.[98] In such case, the criminal substantive and procedural laws of both the state and the United States would apply as in a Concurrent Legislative Jurisdiction area and trial of a civilian criminal offender would be had in the appropriate court, state or federal, in accordance with an agreement between state and federal prosecutors.

Proprietary Jurisdiction

A fourth and final type of jurisdiction over federally owned land is known as Proprietary Jurisdiction. In these areas the United States exercises only the rights of a proprietor or private landowner.[99] The state exercises its entire jurisdiction, civil and criminal over the area, including the trial of criminals in its own courts under its own law. Law enforcement agents of the state have complete authority over these areas, but like the situation of Concurrent and Partial Jurisdiction described above, the state is often either unable or unwilling to commit scarce police resources to the installation.[100] Once again, military police accomplish day to day law enforcement, handing civilian criminal offenders over to state authorities for trial.

Mixed Jurisdiction

While some military installations are entirely either under Exclusive, or Concurrent, or Partial, or Proprietary Jurisdiction, most installations generally contain parcels of land, each with different types of jurisdiction.[101] Thus, it is often necessary to determine the particular tract of land on which a criminal offense occurred before one can determine what substantive law, state or federal, applies. The reason for this mixture of jurisdictional areas is that military installations have rarely been acquired in one package. Rather, they expand and contract by purchases and sales of tracts or parcels, acquired sometimes with state consent and sometimes without state consent.[102] Additionally, at the time of the acquisition of each parcel an agreement may be made between the state and the United States as to the type of jurisdiction to attach to the land. When no agreement is reached, only proprietary jurisdiction attaches.[103]

On military installations with mixed jurisdiction, military police cannot rely on the substantive law of only one sovereign when conducting law enforcement activities. Often, for example, they must consider the criminal procedural law of the state on one side of a street, and federal criminal procedural law on the other side because the street is a tract boundary marking the parcels which have different types of jurisdiction. To illustrate the difficulty of law enforcement on such a street, suppose a civilian murders a person in an area under Exclusive Jurisdiction on one side of the street on one day and on the next day another civilian commits a murder on the other side of the street, an area of Proprietary Jurisdiction. The offender on the first day is apprehended and turned over to federal authorities for trial in the

Federal District Court. The offender on the second day would be turned over to state authorities. The rules of the state and the federal government governing law enforcement procedures may vary significantly, not only in the scope of authority that the military police exercise in each area, but also in the methods used to effect the arrest, the quantum of force and restraint that may be imposed, and the extent to which the individual may be the subject of investigation, including the search and seizure of his property.[104]

A complicated jurisdictional system such as that described above, requires that military police be trained locally as to the extent of authority he has at any given place on a military installation and the steps he must take to insure that civilian offenders are properly delivered to appropriate civilian authority.[105] For this reason, Army manuals require military police coordination with the local judge advocate when questions arise concerning what law applies to a given situation at a given place at a military installation.[106]

In response to a request for guidance, a local judge advocate must go through a complicated process. First he must determine where the incident occurred and the type of jurisdiction that applies. Once determining this, the applicable substantive law, state or federal, is reviewed to determine whether a crime has been committed. If so, agreements between federal agencies or between federal and state authorities are reviewed to determine which civilian officials should be given custody of the offender for trial.[107] However, if the military police inquiry concerns law enforcement matters, rather than what substantive crime has been committed, the process of responding is further complicated. As there is no general statutory authority granted to military

police to arrest civilians or conduct searches and seizures, once again the judge advocate must determine to what extent, under state or federal law, depending on the jurisdiction, the military police may restrict a civilian's liberty or seize his person or property.

Since no state or federal statutory law specifically grants military police law enforcement authority,[108] the judge advocate must consider which one of three current theories of military police authority will best provide effective law enforcement while protecting the police from civil or criminal liability and civilians from unlawful police conduct.

Theories of Military Police Authority

Army legal advisors have developed three separate theories to explain the legal authority of military police when confronting civilian misconduct on an installation. Originally, these theories were developed in response to commanders and Armed Forces staff planners who requested opinions of the Judge Advocates General of the Armed Forces as to the extent and scope of authority military police exercise over civilians. The importance of these legal rationales today is that they have been incorporated in service regulations and adopted by courts when military police law enforcement activity has been challenged by civilians. A review of these theories, however, reveals that each is so different in application that they only exacerbate the already complex research and opinion process used by the local judge advocate.

Protection of Government Property

The legal rationale that was first developed by legal advisors to the military is based on the theory that the government has the sovereign authority to protect government owned property. In an early

opinion, the Attorney General of the United States ruled that the right of agents of the United States to take protective action includes the right to search and seize property.[109] This theory was later applied to military law enforcement by Colonel William Winthrop, an early military legal scholar, who noted that commanders have a responsibility to protect U.S. government property entrusted to them, and in exercise of this responsibility, may conduct law enforcement activities against civilians.[110] Later, the Judge Advocate General of the Army described this theory as justifying searches and seizures without warrants of property in automobiles operated by persons not subject to the Uniform Code of Military Justice (UCMJ), with or without their consent.[111] He reasoned that government property is protected by recovering it from potential criminal offenders as they seek to remove it from a military installation.

This theory has been cited by courts as justification for searches and seizures authorized by statute in restricted areas,[112] and as permitting the use of federal troops in law enforcement roles in civil disturbances.[113] A concise statement of this theory is presently contained in a Department of Defense directive:[114]

> Protection of Federal Property and Functions: Authorizes Federal action, including the use of military forces, to protect Federal property and Federal Governmental functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection.

Note that the Directive does not limit this protection theory to property interests but includes protection of the functions of government. While the theory that soldiers may engage in law enforcement to protect government functions as well as to protect government property is widely supported in case law dealing with law enforcement activities

of soldiers utilized in civil disturbance activities off post,[115] it has not found favor in opinions of Judge Advocates General or in court opinions dealing with on post law enforcement. Rather, reference is usually made in these opinions to one of two other law enforcement theories.

Commander's Authority to Maintain Law and Order

At Military Installations

Perhaps the broadest theory supporting law enforcement over a civilian is that a commander has the inherent authority to maintain law and order at the installation he commands. This authority has been recognized by the Supreme Court in the bellweather case of Cafeteria Workers v. McElroy[116] holding that a commander can bar civilians from his base when he determines that they present potential security risks. An opinion of the Judge Advocate General of the Navy reveals how extensive the scope of a commander's authority and of delegations of his authority to military police can be:

> . . . a commanding officer has the undisputed right to regulate traffic within the reservation he commands. The right is derived from the police power inherent in the military commander and acting under this power, he may lawfully impound a motor vehicle which is parked within his reservation contrary to his regulations and he may lawfully have this vehicle towed away by a commercial concern and stored until claimed by the owner.[117]

Similarly, the Judge Advocate General of the Army has opined:[118]

> The commander (of a post) is the agent of the Federal Government responsible for the post and vested with powers, including the quasi-legislative powers involved in (promulgating) regulation(s), necessary to administer the post. In the absence of a superseding statute or directive from higher authority, he may do those things which are reasonably related to the discharge of his responsibilities . . .

As broad as this theory appears to be, it has not been accepted by the courts or the Judge Advocates General as a substitute for statutory

police authority, particularly in satisfying the Fourth Amendments' proscriptions on unlawful search and seizure. Courts tend to look for some statutory authority,[119] and the Judge Advocate General often limits his opinions to supporting the bare authority to search but rendering no opinion on the admissibility of the seized evidence in a subsequent criminal trial.[120]

Since neither the courts nor the Judge Advocates Generals' opinions address these law enforcement issues, judge advocates must continue to research for authority which will support military police conduct, that is, making military police arrests of civilians lawful and evidence seized from civilians admissible in a criminal court. A third legal rationale was suggested by the Supreme Court of the United States[121] and subsequently adopted in Army Regulations.[122] However, an examination of this third rationale known as citizen's arrest reveals it has not been fully developed enough to address all law enforcement situations confronted by military police when dealing with civilian criminal offenders.

Citizen's Arrest

As noted above, the United States Supreme Court in United States v. DiRe[123] ruled that a federal agent, who has not been granted by Congress the authority to arrest, has the ordinary authority of a citizen to make a citizen's arrest in accordance with state law applicable to the place where the arrest is to be made. Army Regulation 600-40 has adopted this ruling by recognizing that all soldiers retain the ordinary rights of citizens to arrest other civilians for criminal offenses when the arrest complies with the citizen's arrest laws of the place where the arrest occurs.[124] But state laws vary as to the circumstances in which

a citizen, and therefore a military policeman at a military installation within a particular state is authorized to arrest another citizen.

Some states only permit a citizen to arrest when a felony[125] is committed in their presence, some for felonies and misdemeanors[126] in their presence, and some limit such arrests to only certain types of misdemeanors.[127] For example, in Green v. James[128] a civilian motorist at a military post in Hawaii challenged the right of an Army colonel, who was not a military policeman, to stop her for a traffic violation. The colonel cited the Army Regulation's[129] citizen's arrest provision as authority for his action. The court noted, however, that the motorist had only exceeded the speed limit[130] by five miles per hour. This constituted neither a felony nor a misdemeanor amounting to a breach of the peace,[131] the only crimes for which a citizen pursuant to Hawaii law could arrest another citizen.

The Green case reveals the weakness of the citizen's arrest theory as a basis for military police law enforcement authority over civilians at military installations. In many states there are a substantial number of crimes which could be committed by civilians when on a military installation that do not qualify as crimes for which a citizen and therefore a military policeman could make a citizen's arrest. In most states these non-qualifying crimes would include, for example, minor traffice offenses,[132] simple assaults,[133] minor larcenies,[134] shoplifting,[135] possession of marijuana[136] and other minor offenses. The inability to effect a citizen's arrest for these crimes renders this citizen's arrest theory as less than a satisfactory legal rationale to support military police law enforcement against civilians.

A second weakness of the citizen's arrest theory is the difficulty the judge advocate at a military installation may have in determining what state law should be applied to a law enforcement problem involving civilian misconduct in an area of a military installation over which the United States exercises Exclusive Jurisdiction.[137] When using such a situation as a model, it is not clear what state citizen's arrest law applies. Quite often areas of Exclusive Jurisdiction at military posts were acquired at a time when the state had not as yet codified its citizen arrest law.[138] In such a case, the state law of citizen's arrest is the common law doctrine providing for citizen's arrest only for felonies committed in the presence of the arresting citizen.[139] Years later the state may have enacted a statute permitting citizens to arrest not only for felonies but also misdemeanors committed in the citizen's presence.[140] The issue for the judge advocate is which citizen's arrest law to apply.

In seeking to resolve this issue, the judge advocate is faced with conflicting legal theories. On the one hand, state law enacted after the acquisition of the land by the United States, is not applicable to that land.[141] Therefore, the common law citizen's arrest doctrine would apply and military police could arrest civilians only for felonies. On the other hand, Army regulations can be interpreted as adopting current state citizen's arrest law even to areas under the Exclusive Jurisdiction of the United States.[142] In this case, military police may, pursuant to current state law, make a citizen's arrest for felonies or misdemeanors committed by civilians on the installation.

The judge advocate who is advising military police on the scope of their authority under the citizen's arrest rationale is confronted

with a dilemna. He cannot safely avoid potential future litigation by advising use of either the older common-law doctrine or current state law. There is no legal precedent or scholarly opinion to guide him. The issue simply has not been settled by the courts or ruled upon by the Judge Advocates General of the Armed Forces. Thus, if he advises use of the common law only, the military police may only have arrest authority over a very limited number of civilian offenders and thereby hesitate to enforce the law against misdemeanants. But if he advises use of current state law, the military police may be held by a court to have exceeded their citizen's arrest authority because only the older common law doctrine applies. In such a situation, the military police face potential civil or criminal liability[143] or, at a minimum, a potential ruling in a court that evidence seized incident to the arrest is inadmissible[144] because of a violation of the civilian's constitutional rights.

This dilemna is significant because the majority of offenses committed by civilians at military posts are misdemeanors.[145] In addition, a large number of military posts contain areas of Exclusive Legislative Jurisdiction where the model described above is applicable.[146] Thus, there are many areas of many military posts where there exists significant doubt as to the scope of military police citizen's arrest authority.

Summary and Conclusions

In Chapter II an examination of the history of law enforcement by uniformed police, particularly military personnel, revealed a long standing tradition in American society of withholding police power from federal troops. However, the conclusion reached was that current civil-military power relationships accomodate the use of uniformed

military police to maintain law and order at military installations in the United States. This accomodation is based on the recognized need for law enforcement over civilians who live at, work on or visit military installations in order to assure that government property is protected and the function of government is accomplished. Finally, despite a long legal tradition in the United States of codifying grants of law enforcement authority to uniformed police, Congress has not yet granted military police a statutory authority to conduct law enforcement operations involving civilian criminal offenders at military installations.

In this chapter the current legal rationales underpinning law enforcement practices were examined. This examination was made with a view of assessing the validity and appropriateness of the rationales in providing guidance to the military police on the scope of their law enforcement authority. Law enforcement at military installations is governed by a complex system of legislative jurisdiction which requires military police and their legal advisors to engage in a complex decision-making process for determining what law, state of federal, applies to a particular incident of criminal conduct by civilians at a military installation. Once identifying the exact location on the installation where the conduct occurred and what type of legislative jurisdiction applies, the military police and their legal advisors next must decide what law governs the crime committed so that a civilian criminal offender may be delivered to the appropriate civilian law enforcement authorities. Although this decision-making process is itself complex, the determination of the jurisdiction for the law enforcement conduct to be used by military police, such as arrest, search and seizure of property, and use of force, is even more complicated.

There are three distinct theories used to justify military police conduct at military posts: protection of government property and functions; commanders inherent right to maintain law and order at the installation he commands; and the ordinary authority of soldiers as citizens to make citizen's arrests. Each theory leaves significant gaps in effective law enforcement and together merely provide unnecessary complication in determining whether a particular exercise of police power by the military police over civilians is lawful.

Thus, the protection of government property and functions theory does not logically explain arrests and searches and seizures of evidence from civilians for crimes such as simple assaults, drug offenses and other minor crimes unrelated logically to protection of government property. Further, the rationale has not been developed by the courts to any extent, thus making the judge advocate unable to provide a predictable result when or if the police conduct is challenged in a court of law.

The second theory--citizen's arrest--based as it is on state law, does provide more of the necessary specificity in guidance for particular law enforcement problems. However, states have not developed rules of procedure for all law enforcement areas; there is still doubt in some states as to the extent of a citizen's authority to search incident to the arrest.[147] Additionally, it is often not clear whether current citizen's arrest law is to control or the citizen's arrest law applicable at the time the United States acquires jurisdiction over the area where the arrest is to be made. Finally, citizen's arrest law varies from state to state and often a particular state's citizen's arrest law will not support military police law enforcement over minor misconduct by civilians.

The current rules of law supporting lawful military police law enforcement over civilians are inadequate in coverage and so complex for lawyers and military police alike that effective law enforcement may be jeopardized on the mere ground of ineffective guidance. The need for clear guidance to military police in accomplishing their law enforcement activity was aptly stated by the President's Commission on Law Enforcement in 1967 when it investigated the exercise of police power throughout the United States:

> . . . it (the Commission) believes that it is both inappropriate and unnecessary for the entire burden of exercising this discretion (to decide when an arrest is lawful) to be placed on individual policemen in tumultuous situations. It is incumbent on police departments to define as precisely as possible when arrest is proper action and when it is not.[148]

Thus, manuals similar to those available to military police for law enforcement against soldiers are necessary for military police law enforcement involving civilians. But these new manuals cannot be drafted unless and until Congress by statute authorizes military police law enforcement against civilians, as it has already authorized law enforcement against soldiers in the UCMJ. For until such action by Congress, the current theories of law enforcement are too complex to be used as standards to guide both manual drafters and the military police in providing effective law enforcement at military installations.

The mere complexity of law enforcement theory upon which the arrest of a civilian and the search and seizure of his property is based, is itself a persuasive argument for Congress to provide military police with a uniform, complete, and simple grant of law enforcement authority to military police over civilians at military installations. But, an examination of the appropriateness of the theories in preventing unlawful military police conduct provides convincing evidence that Congress should

act as soon as possible to provide civilians who live at, work on and visit military installations with protection from a loss of valuable constitutional rights. This examination of current law enforcement theories will reveal that they do not adequately protect citizens' rights nor provide for effective prosecution of criminal offenders.

CHAPTER IV

EFFECTIVE LAW ENFORCEMENT

Thus far, this paper has centered on legal rationales used to support the utilization of soldiers, specifically military police, as law enforcement agents at military installations. The discussion has focused on the central issue of whether such utilization is lawful. In this chapter, the focus shifts to a determination of whether, in the absence of a Congressional statute, military police can effectively operate as law enforcement agents when confronted by civilian criminal conduct at military installations.

Effective law enforcement results from police properly adhering to rules of procedure which, on the one hand, provide society efficient apprehension, trial and punishment of criminals, while at on the other hand limit unreasonable intrusions of the liberties of citizens who become involved with police whether they be perpetrators of crime or innocent bystanders.[149] These rules of procedure are established in statutes enacted by both state legislatures and Congress[150] and in the opinions of criminal courts charged with guarding the individual citizen's liberties against unwarranted police intrusions.[151] The Bill of Rights, and more particularly the Fourth Amendment's proscription on unreasonable searches and seizures, is the principle constitutional standard against which rules of procedure governing police law enforcement is measured.[152] Since the early case of United States v. Weeks,[153] the Supreme Court has excluded evidence obtained by federal police agents who unlawfully invaded a citizen's Fourth Amend-

ment right to be free from unreasonable searches and seizures. The exclusion of such evidence is aimed at deterring police from future unlawful conduct. The logic of the rule is that police will refrain from abusing citizens when the police realize that subsequent prosecution will be more difficult or impossible because of the inability to bring evidence necessary for conviction before a criminal court.[154]

The conduct of military police in executing law enforcement functions against civilian criminal offenders has not escaped court scrutiny.[155] Civilians have challenged conduct of military police claiming they have been unlawfully arrested[156] or been subject to unlawful searches and seizures in contravention of their Fourth Amendment rights.[157] The purpose of this chapter is to examine the current legal rationales supporting military police law enforcement activities against civilians in light of the Fourth Amendment. The examination will focus on the validity of the rationales in the areas of lawful arrest and search and seizure of property incident to military police arrest of civilians at military installations. The examination reveals that the current legal rationales do not satisfy Fourth Amendment standards. Military police who confront civilians at military installations are therefore not only subjected to potential civil and criminal liability but also the successful prosecution of civilian criminal offenders is made more difficult if not impossible.

Lawfulness of Military Police Arrests of Civilians at Military Installations

The Fourth Amendment to the U.S. Constitution forbids the unreasonable seizure of a person.[158] Seizures of persons within the meaning of the Fourth Amendment are known as arrests or apprehensions. These terms had

distinct meanings in English common law. The term arrest was used to describe a writ filed with a civil court by a sheriff or an ordinary citizen to seize the person or the property of a debtor.[159] The term apprehension referred to the seizure of a person for purposes of physically bringing him before a court for the trial of a criminal offense.[160] Apprehensions could be effected by private persons, by certain officials (virtuti officii--for example, sheriffs, constables and police), upon "hue and cry" of night watchmen, or by warrant issued by a criminal court (virtui praecepti).[161] From earliest times in America both the terms arrest and apprehension have been used interchangeably to describe the taking into custody of an alleged criminal offender in order that he could be brought into the proper court to answer for a crime.[162]

Both courts and legislatures jointly establish the rules governing who has the power to arrest, the circumstances under which an arrest can be made, and the scope of any search for evidence that can be made incident to an arrest.[163] These rules are contained in statutes in all states[164] in federal statutes[165] and opinions of courts both in criminal and civil cases.[166] In criminal cases, the rules result from a challenge by the defendant that the conduct of the police was unlawful and therefore evidence seized incident to the arrest ought to be excluded from the court.[167] In civil cases, the rules result from a person claiming damages for injuries resulting from a false arrest, a false imprisonment or assault and battery at the hands of police.[168] The opinions of the civil and criminal courts are then used as precedent interchangeably by later civil or criminal courts.[169] A careful comparison of current rules of lawful arrest with the legal rationales supporting military police arrests of civilians reveals that the legal rationales supporting the military police are inadequate.

Defendants in criminal trials often challenge the bare authority of the person making the arrest. If the court rules that the person effecting the arrest was not authorized to make arrests, criminal charges will not be dismissed.[170] The defendant can still be prosecuted for his criminal offense despite the unlawfulness of his arrest because the court in which he is challenging the arrest will have jurisdiction over the offense regardless of the lawfulness of the arrest.[171] However, if the arrest was in fact unlawful, the court can exclude evidence seized incident to the arrest.

Courts have long held that a search incident to a lawful arrest is a reasonable search and seizure under the Fourth Amendment.[172] Such a search is based on the common law doctrine that a constable has the right to search the person and his possessions, which are within his immediate reach, to protect himself from possible violence by the person arrested or to seize material evidence of the crime committed.[173] Both police and citizens having arrest authority may lawfully conduct such a search.[174] However, if the person conducting the search incident to arrest is not authorized to arrest in the first place, any evidence seized will be excluded in a subsequent trial.[175]

For example, in United States v. Haw Won Lee,[176] a customs inspector detained the defendant and searched his suitcase finding some rare jade which had been brought into the country illegally. The defendant objected to the admission of the jade as evidence in his criminal trial. The government argued that the search was incident to a lawful arrest. The court held that Congress had granted customs agents only the authority to make arrests for drug violations not for illegal importation of jade and therefore the jade was inadmissible. Similarly, in Alexander v.

United States,[177] the court held that postal inspectors lack statutory authority to arrest and therefore evidence seized by postal inspectors from a mail carrier was inadmissible in a trial for larceny from the mails.

The Alexander case is a good example of how strictly courts will construe criminal procedure statutes dealing with arrest authority. The statute governing postal inspectors stated that they "apprehend(s) and effect(s) arrest of postal offenders."[178] The court interpreted this statute to mean that a postal inspector merely "investigates and furnishes the predicate for others to make the arrest and aids in the arrest process."[179]

In United States v. DiRe,[180] the Supreme Court ruled that an arrest that is not authorized by federal law may be valid and evidence admissible in a criminal trial if the arrest is valid under state law applicable to the place of arrest. Under this principle courts look to the citizen's arrest law of the state to determine the validity of the arrest.[181] Two problems surface in following this principle to justify a search incident to arrest. First, the grounds for arrest vary from state to state, and, as noted previously, many crimes, notably misdemeanors or crimes committed out of the presence of the citizen making the arrest, cannot form the basis for a citizen's arrest. In such cases, the apprehension and subsequent search is unlawful as in the Haw Won Lee case above.[182] Secondly, not all states permit citizens to search incident to arrest. For example, in United States v. Viale,[183] a search incident to a citizen's arrest made by a postal inspector under New York law was held invalid because New York law did not authorize a search incident to a citizen's arrest. Only seven states currently expressly authorize citizen searches.[184]

In view of this strict construction courts place on statutory police authority to arrest for purposes of admitting at trial evidence seized incident to arrest, the legal rationales used to support military police arrests of civilians at military installations do not satisfy Fourth Amendment prescriptions. Military police citizen's arrests face challenges similar to those of customs inspectors and postal inspectors. First, there are numerous crimes for which military police cannot effect a citizen's arrest under applicable state law, such as misdemeanors or serious crimes committed out of their presence but for which they are called to make an arrest subsequent to the commission of the crime. In such cases, evidence of the crime, seized incident to the arrest, may be held to be inadmissible as in the Alexander[185] and Haw Won Lee[186] cases. Secondly, even if a citizen's arrest is valid, evidence seized incident to the arrest may be inadmissible in a majority of states and therefore in Federal Courts by virtue of the DiRe doctrine.[187]

The protection of property and maintenance of law and order rationales supporting military police law enforcement also do not appear to muster the standards of the Fourth Amendment as interpreted by the courts. No courts have specifically approved these theories as justifying a Fourth Amendment search incident to arrest. Those few courts which have adjudicated the issue have not established a concise theory supporting the arrest. For example, in United States v. Mathews,[188] military police stopped a civilian in a training area of Fort Sill, Oklahoma, based on the commander's maintenance of law and order authority to make routine traffic checks of vehicle licenses and registrations. As the military police looked into the car, they saw marijuana lying on the dash. The military police then apprehended Mathews. One of the military police saw

marijuana in Mathew's pocket as a result of a pat down search incident to the stop and later apprehension. Mathews objected to the use of this marijuana as evidence contending that the military police had no authority to stop the car in the first place and that since this stopping was an unlawful arrest[189] all searches thereafter were unlawful as "fruit of the poison tree."[190] The court ruled that military police are law enforcement agents without citing any authority for the proposition. Once this hurdle was jumped, the court had little difficulty finding that a stop by law enforcement authorities to make routine traffic checks, or even on suspicion of crime, was lawful under current Supreme Court cases holding that police officers can stop and frisk persons who are suspected of crime or in routine traffic checks.[191]

The Mathews case seems to be inappropriate in light of Mr. Justice Jackson's oft-quoted conclusion in Johnson v. United States[192] that courts ought not to "obliterate one of the fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law" (emphasis added). To hold as in Mathews that vague notions of protection of property or maintenance of law and order justify arrests under the Fourth Amendment is, as stated by the court in the Alexander case, having "policemen by inference, and persons should not be vested with authority by statutory obliqueness."[193] The Alexander case is one of many[194] in accord with the sounder principle, long a tradition in America, that arrest authority ought to be specifically stated in a statute.[195]

A second case in which military police arrest authority was challenged, was decided by the court in the more traditional manner of searching for statutory authority. In United States v. Banks,[196] military

police apprehended a civilian in a barracks building a McChord Air Force Base. A search incident to the arrest uncovered heroin on Bank's person. He challenged the authority of the military police to lawfully make the arrest. The court held that military police have the authority to arrest pursuant to two statutes--Article 9 of the UCMJ[197] and 18 U.S.C. § 1382.[198] Article 9 of the UCMJ authorizes military police to apprehend (and thereby search incident thereto) persons subject to the UCMJ. As civilian criminal offenders at military installations are not subject to the UCMJ, the court obviously erred in ruling that Article 9 authorized the arrest of Banks, a civilian who at the time of his arrest was on McChord Air Force Base.

Similarly, the court's use of 18 U.S.C. § 1382 as authority for the arrest is inappropriate. That statute defines two substantive criminal offenses: (1) entering a military post for purposes of violating law or regulation; and (2) reentering a military post after having been barred by the post commander. The court in Banks is in obvious error in relying on this statute, a statement of a substantive criminal offense, as a basis for police arrest authority.[199] Statutory statements of substantive offenses have never been used by courts as justifying searches and seizures under the Fourth Amendment. To carry such a rationale to its logical conclusion would mean that any person could seize any other person merely because any crime was committed. If such were permitted by courts there would be little need for the Fourth Amendment and a police state would be a certainty.

Perhaps the courts in Mathews and Banks were over zealous in upholding military police arrest authority in an effort to fill the void in police power that currently exists at military installations. In both

cases, the criminal activity of the civilian defendant, drug possession, was obvious, assuming admissibility of the evidence of the crime. Courts traditionally have taken a pragmatic approach to maintaining a balance between individual rights on the one hand and society's need to prosecute criminals for their derelictions.[200] However, when confronted by challenges to police conduct invading Fourth Amendment rights, particularly in seizures of the person, the words of Judge Irving R. Kaufman in United States v. Como[201] appear more sound than the approach in Mathews and Banks:

> The civilized standards of fundamental fairness developed over the years in this area must be zealously guarded by the trial and appellate courts if the guarantees of the Bill of Rights are to be kept meaningful and not permitted to evaporate through silent abrogation.

The "silent abrogation" of the Bill of Rights is even more prevalent when one examines the courts view of searches and seizures of property from civilians by military police at military installations, in cases where the search is not incident to a lawful arrest.

Lawfulness of Military Police Searches and Seizures of Property from Civilians at Military Installations

In situations where seizures of persons or property incident to lawful arrest are not involved, courts have been more willing to uphold military police searches and seizures of property from civilians at military installations. This is particularly so when the search and seizure is accomplished pursuant to specific authorization by a commander based on probable cause. Since the inception of the exclusionary rule, courts have held that evidence seized pursuant to a warrant issued by a neutral

and detached magistrate on the basis of probable cause that criminal evidence is located at the place and at the time of the search and seizure, is admissible in a criminal trial.[202] Further, when some exigent circumstance exists which precludes police from obtaining a warrant, courts have permitted police searches and seizures of property based on probable cause.[203] Finally, if an individual knowingly and voluntarily consents to a search and seizure of his property by police, the evidence seized by police is admissible in a subsequent criminal trial.[204] Each of these rules has been approved by courts as applying to military police searches of civilians at military installations.

For example, in United States v. Burrows,[205] military police obtained an authorization from the installation commander to search a van occupied by civilians based on probable cause that the van contained marijuana. The court ruled that the marijuana seized from the van was admissible. Relying on the commander's authority to maintain law and order at the post as contained in Army Regulation 210-10, the court held that the commander is a neutral and detached magistrate within the meaning of the Fourth Amendment.[206] As an alternative ground for holding the evidence admissible, the court noted that the civilians could have driven the van away and thus even in the absence of a valid warrant, the military could have searched the van under these exigent circumstances because they had probable cause to believe that a crime was being committed (possession of marijuana) and that evidence of the crime was in the area (van) to be searched.[207]

Military police searches with the consent of civilians have been sustained by all courts which have faced the issue.[208] In fact, courts have been willing to sustain searches of automobiles based on an implied

consent of the driver when he entered a military installation bearing a sign warning those entering the post they were subject to search.[209] Another type of search peculiar to the military, is a search authorized by statute, of persons found within a restricted area.[210] These persons are subject to immediate search without a warrant. Courts have admitted evidence seized in such searches,[211] sometimes not specifically or clearly limiting their holdings to situations where the statute would apply. Thus, later courts often use these restricted area search precedents inappropriately as precedents for searches conducted in non-restricted areas of military posts.[212] Because of this, all search and seizure cases must be read carefully by judge advocates who are advising military police.

Additionally, cases on search and seizure of property other than incident to an arrest of a civilian rarely address the issue whether the military police who are conducting the search are in fact authorized persons for search purposes. The opinions of the courts either contain bold assertions that military police are law enforcement personnel[213] or contain no mention of the police authority of military police other than to simply identify the military personnel who conducted the search as military police.[214] All courts use as precedent cases from civilian courts involving challenges by defendants to searches and seizures by statutorially authorized civilian police. This silence on the issue of military police authority may be a result of the issue not being raised by civilians out of ignorance, or as a method used by the courts to once again resolve the matter in a pragmatic fashion. In either event, such silence once again flies in the face of Judge Kaufman's sound fear of silent abrogation of consitutional rights. It is the duty of courts to insure that the Bill of Rights is fully guaranteed to every citizen by adjudicating the critical issues.

As important as the clarification of these issues is to the preservation of citizens' constitutional rights, so is the clarification of these critical Fourth Amendment confrontations important to the military police. Day to day these young men and women confront civilians in an effort to keep the peace on military installations. To the civilians, a stop by military police is not thought of in terms of the niceties of Fourth Amendment law. It is either fair or unfair, and will invoke docile adherence to the directions of the military police or violent reaction. Where police conduct is lawful, the courts have long protected police from any liability to civilians who, though docile at the time of confrontation, later sue for damages for false arrest.[215] Similarly, all states make resistance to lawful arrest and search and seizures[216] itself a crime and an additional charge at trial. In some jurisdictions such resistance to lawful police conduct can itself be offered at trial as evidence of the guilt of the defendant of the crime for which the police arrested him in the first place.[217] But, should police conduct be unlawful, the courts recognize a right to resist an unlawful arrest[218] and will hold police liable for civil damages[219] to the person unlawfully arrested. Further, the courts may even impose a criminal penalty on the police.[220] A review of these rules in view of the gaps in military police authority shows that Congressional inaction in granting them statutory authority places military police in danger of death or injury or later civil and criminal liability.

Liabilities of Military Police for Unlawful Arrest or Search and Seizure of Civilians

The Right to Resist an Unlawful Arrest

In addition to lack of guidance and potential ineffective law enforcement because of Fourth Amendment violations, military police face potential injury or even death when confronting civilian criminal offenders at a military installation. In a majority of states, citizens are permitted to resist an unlawful arrest with force.[221] In these states, military police subject themselves to civilian use of force against them when they attempt to effect an arrest or a search and seizure of property from a civilian in circumstances where the state citizen's arrest law does not authorize an arrest or a stop for purposes of conducting a search. The result of such a use of force by the civilian has been succinctly stated:

> In the unlawful arrest scenario, the officers have a duty to overcome resistance and perfect the arrest, and citizens have a right to prevent unlawful arrest by forcible resistance. This results in the alternating escalation of force by each party until the watershed is reached and one of them is either seriously or fatally injured.[222]

Such a scenario has occurred in situations involved military police law enforcement activity involving civilians, resulting in death and injury to both the military personnel and the civilians who offered resistance.[223] The scenario is also not unusual in the civilian community in common civilian police law enforcement activity.[224] The incidence has led some scholars to propose that the states enact statutes prohibiting citizens from offering resistance to unlawful arrests.[225] However, only six states have thus far enacted such statutes.[226] In four others the courts have limited civilians in the use of force to resist an unlawful arrest.[227] The majority of states reject prohibiting civilians resisting an unlawful arrest on the sound basis that:

> The freedom to refuse to obey a patently unlawful arrest is essential to the integrity of a government which purports to be one of laws, and not of men.[228]

Legal scholars who have studied the doctrine of resistance to unlawful arrests suggest that the best method of avoiding a potential injury-causing scenario is for the states to adopt legislation which carefully delineates the scope of law enforcement authority possessed by police and then insure that the police are carefully educated and trained to exercise their authority only within the prescriptions of the law.[229] Secondly, these scholars suggest that the states enact necessary legislation to provide a citizen who should be unlawfully arrested, a civil damage remedy for false arrest or unlawful use of force by police.[230] The remedy should be payable by the state or municipality where the police, although in fact unlawfully arresting a person, are acting within the parameters of the scope of their authority and in good faith. In the situation where police act maliciously, with full knowledge that they are acting unlawfully, civilians can sue the police individually or the police can be charged with a criminal offense.[231] The effect of these two governmental actions is to insure that police stay within the bounds of propriety on the one hand and on the other hand protect the citizen who finds himself injured in an unlawful confrontation by the police.

With regard to military police, Congress has neither prohibited citizens from resisting unlawful arrest nor has it statutorily stated a clear and precise authorization to arrest. The failure to prohibit citizens from resisting unlawful arrest by military police at military installations has led the courts to rule that in the absence of federal law governing the issue, state law applies.[232] Thus, military police in all but six states are subject to potential injury or death at the hands of citizens in situations where the citizen's arrest law of the state does not permit the particular arrest,[233] for example, felonies committed

by civilians out of the presence of the military police but reported to them, or for misdemeanors. In all but these six states, the potential injury or death to either the military police or the citizen who is the subject of police arrest can best be avoided by Congressional action, suggested by the legal scholars, to provide military police a precise statutory arrest authority.

Congress has acted, in accordance with the suggestion of scholars, to provide citizens a tort remedy for unlawful military police conduct.[234] Similarly, the federal courts have recently provided citizens, whose Fourth Amendment rights have been violated by police, a tort remedy recoverable against the individual police law enforcement agent.[235] As the discussion below will reveal, this action by Congress and the courts properly protects both the military police and the citizen in an unlawful arrest scenario in terms of the later tort litigation.

However, this later protection does little to solve the escalation of violence at the scene of military police arrests because of Congressional inaction on the first of the scholar's proposals. Without a clear definition of authority, military police still must rely on citizen's arrest authority which has major gaps. Yet they are charged with conducting law enforcement activity even for crimes committed by civilians which are not crimes for which citizens can be arrested. Thus, the citizen has the lawful prerogative of offering resistance thereby subjecting themselves and military police to violence. Our government, which places these military police and its citizens in such a position, is duty-bound to minimize the potential harm to all parties by restricting the police to conducting law enforcement in accordance with statutory guidance. A statute will avoid unlawful arrest confrontations and fulfill the governments charge to be a government of laws and not men.

As noted above, Congress and the courts have jointly fashioned a complete scheme of law providing civilians tort remedies for unlawful law enforcement activities that cause them injury. Congress in the Federal Tort Claims Act, has permitted the United States to be sued and held liable for unlawful law enforcement activity of federal agents.[236] The courts have permitted civilians to sue and recover damages from individual federal law enforcement agents for unlawful police conduct.[237] An examination of these rules reveals that the legal rationales of protection of government property, a commander's mission to maintain law and order, and the citizen's arrest theory are only partially valid as bases for insulating both the United States and individual military police men and women from liability for law enforcement actions taken against civilian criminal offenders at military installations.

Tort Liability of Military Police and the United States for Unlawful Law Enforcement Activity

Since 1974, the Federal Tort Claims Act provides that the United States can be sued and held liable to pay monetary damages to citizens who are injured by the intentional torts of false arrest, false imprisonment and assault and battery of federal law enforcement agents acting within the scope of their employment.[238] The act does not define who are law enforcement agents of the federal government but the Judge Advocate General of the Army has concluded that the term includes military police and civilian gate guards.[239] Thus, civilians can recover money damages from the United States if they are injured by the intentional torts of military police where the torts are committed in the scope of employment of the military police.

Whether the military police are acting within the scope of their employment depends upon the description of their duties in statute or regulation.[240] Since the legal rationales of protection of government property, maintenance of law and order, and citizen's arrest are all described in Army Regulations, courts will have little difficulty in ruling that the United States may be held liable for the intentional torts of military police. While there has not yet been a court opinion so holding, litigation involving the intentional torts of military personnel prior to 1974 all resulted in courts ruling that military personnel are within the scope of their employment when using force to protect government property or in maintaining law and order at military posts.[241] In these early cases, civilians were denied any recovery where the courts found military personnel operated in the scope of their employment because the Federal Tort Claims Act did not authorize recovery against the United States and federal agents were held to be immune from suit if they were acting within the scope of their employment.

For example, in Cerri v. United States,[242] a military gate guard fired his weapon to halt a civilian fleeing from a military pier in San Francisco. The bullet struck Cerri's wife, killing her. Cerri sued the United States under the Federal Tort Claims Act claiming the military guard was grossly negligent in firing his weapon. The court held that the guard was charged by regulation to protect government property at the pier and was authorized by regulation to use force for such purposes. Therefore, he was acting within the scope of his employment and the Federal Tort Claims Act, (at that time) barred suit against the United States for acts of its agents within the scope of their employment even if grossly negligent.[243] Had the Cerri case arisen after 1974, the United States

would be liable for the guard's conduct under the 1974 Amendment of the Federal Tort Claims Act permitting the United States to be held liable in such cases.

Once the scope of employment issue is resolved by reference to federal law, namely statutes and regulations describing the duties of military police, liability will only attach if the military police conduct constituted one of the intentional torts established by state law of the state in which the conduct occurred.[244] This application of state law results from the Federal Tort Claims Act's provision that the United States is only liable if under state law a private person would be held liable in like circumstances.[245] The effect of this language is to adopt the tort law of the state governing false arrest, false imprisonment, and other intentional torts.

Under a majority of state laws, a person is liable in damages to another person when he falsely arrests or falsely imprisons him. The terms false arrest and false imprisonment are interchangeable.[246] The tort of false arrest (false imprisonment) is the unjustified restraint by one person of the physical liberty of another.[247] The key element of the tort is justification. The burden is on the person effecting the arrest or imprisonment to prove that it was justified by law.[247] It appears that in the absence of a statute delineating specifically when military police are authorized to arrest civilians, the United States could be held liable for the tort of false arrest in each case that the state's citizen arrest law is not applicable. As discussed earlier in this paper,[249] only the citizen's arrest rationale justifies the arrest of civilians at military installations and then only for a limited number of crimes. Should Congress enact a statute authorizing military police to arrest civilians for

all criminal violations, it would significantly reduce the potential number of times the United States would be liable for damages for unjustified police conduct.

A second form of civil liability that exists in military police confrontations with civilians at military installations is the individual personal liability of the military police. Civilians may sue individual military police independently of or in conjunction with a suit against the United States under the Federal Tort Claims Act.[250] The application of state law governing the intentional torts of false arrest and false imprisonment is exactly the same when the suit names the individual police men or women. In this situation, a statute by Congress authorizing military police arrest authority would insulate individual military police just as it would insulate the United States from liability.

Where the military police arrest is justified by law, the actions of the police in effecting the arrest or detention of the civilian can be the basis of a tort suit where the military police use excessive force to effect the arrest or violate a civilian's Fourth Amendment rights. In these situations courts look to the tort law of assault and battery to determine whether the laying of hands upon the civilian is justified.[251] In these tort suits, courts are not limited to reviewing specific arrest statutes but also review regulations and police technique manuals to determine whether the decision to apply the quantum of force used or to invade a citizen's Fourth Amendment privacy right was made in good faith and was reasonable under the circumstances.[252] Since the technical rules of arrest do not address these issues, courts have ruled that military police are justified in using force and searching and seizing property of civilians under both the protection of property[253] and the maintenance

of law and order rationales.[254] These rationales have also been used by courts in relieving military personnel of any criminal liability for injury or death to civilians.[255]

Summary and Conclusions

Although civil-military relationships can accomodate the utilization of military personnel as law enforcement agents on military installations, Congress has not yet chosen to enact a statute expressly authorizing military police to arrest civilians. While this Congressional inaction complicates the process whereby legal advisors seek to guide military police in their day to day law enforcement role, the far greater evil that flows from the lack of statutory authority is the impact on effective law enforcement. Full compliance with the Fourth Amendment's proscriptions on unreasonable searches and seizures of persons and property is required to assure effective law enforcement culminating in successful prosecution of criminal offenders on the one hand, and the protection of individual liberties on the other. The legal rationales used to support military police law enforcement against civilians do not assure full compliance with the Fourth Amendment.

While the rationales of protection of government property and the commander's authority to maintain law and order are properly used by courts to insulate the United States and individual military police from criminal and tort liability, these rationales have not found favor with courts as grounds to support military police arrests or searches and seizures of civilian's property. Rather, courts look to state citizen's arrest law to determine whether a particular arrest or seizure of property was lawful. The citizen's arrest rationale does not satisfactorily support military police law enforcement because it is inapplicable to such a wide

variety of criminal conduct at military installations. As a result, if challenged, criminal evidence seized by military police could often be inadmissible in a subsequent criminal trial because of a violation of a citizen's Fourth Amendment rights. In addition, the citizen's arrest rationale unnecessarily subjects both the United States and individual military police men and women to payment of damages for false arrest and false imprisonment of civilians.

Finally, in a majority of states a person who is the subject of an unlawful arrest may lawfully offer resistance by force. In such situations, the continued escalation of violence jeopardizes not only effective law enforcement but also the safety of both civilians and military police. This fact is especially significant when the majority of civilians today are more willing to challenge both in court and in confrontation, those who appear to exercise authority, than did civilians in years gone by.[256] The savings to the United States in litigation costs and manpower alone mitigates toward enactment of a statute clarifying military police law enforcement authority.

It is fortunate that thus far the courts have been willing to sustain military police law enforcement against civilians. However, a careful examination of these court opinions reveals that often strained logic has been used to arrive at a pragmatic result in cases where not only has there been clear evidence of the civilians' guilt of a crime but also the actions of the military police were well within the parameters of routine police action. Whether these same courts will take a similar stand when faced with cases where there is not clear evidence of criminal activity or where the military police conduct over-reaches approved Fourth Amendment conduct, is subject to doubt. It would appear that a federal

statute establishing military police authority is the best method of removing the doubt while at the same time halting the courts trend of silently abrogating our citizen's constitutional rights while on military installations.

In the next chapter, statutory language will be proposed to solve the critical legal problems caused by the current gap in military police law enforcement authority. Tested against the conclusions asserted herein, the proposed language is: (1) an appropriate grant of authority to military personnel in view of current civil-military relations; (2) provides necessary guidance to military police and their legal advisors; and (3) provides for effective law enforcement by eliminating unnecessary military police violations of citizen's Fourth Amendment rights.

CHAPTER V

PROPOSAL AND CONCLUSION

In each of the areas studied in this paper, the evidence led to the conclusion that military police require statutory authority to properly conduct law enforcement activities on military installations. The purpose of this chapter is to propose statutory language and test it against the needs established in earlier chapters. The proposed statutory language will fill the current gap in law enforcement authority. The proposal will accomodate current civil-military relationships, provide clear guidance to military police and properly accomodate the proscriptions of the Fourth Amendment thereby fostering effective maintenance of law and order at military posts.

Proposed Statutory Language

Any proposed statute to provide military police law enforcement authority must be carefully drafted to insure that criminal laws, state or federal, applicable to any area on the military installation may be properly enforced. As noted in the discussion on legislative jurisdiction,[256] there are areas on almost all military installations where state criminal laws apply. Thus, military police not only must have authority to execute federal criminal law but also state criminal laws. This dichotomy of law enforcement authority is not unique to military installations. Congress has already provided the police of the Federal Protective Service[257] authority to conduct law enforcement activities in areas where the conduct is in

effect the enforcement of state law. Thus, it is not necessary to invent new statutory language. Rather, a statute governing military police can be modeled after existing statutes, tailored to fit peculiar military needs and adopted as an amendment to Title 10, United States Code:[258]

> Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, military personnel assigned to military police duties shall have the power within military installations, posts, camps, and stations, located within the several states or the District of Columbia, to enforce and make arrests for violations of any law of the United States, or of any state, or any regulation promulgated thereto, and may execute the same powers which a sheriff of the state may exercise in executing the laws thereof: Provided that, nothing herein shall authorize military personnel to execute the laws in areas outside of military installations, posts, camps, or stations except as provided in 18 U.S.C. § 1385.

This proposed statute properly grants military police limited powers of police authority at installations by permitting law enforcement under all federal and state law, substantive and procedural, while at the same time adopting as a statutory matter, the limitations placed on police by state and federal courts and state legislatures. These limitations are adopted by granting the military police only the power that a sheriff in the state would have.[259] A close examination of the statutory language reveals that this grant of law enforcement appropriately accomodates current notions of proper civil-military relations.

Civil-Military Relationships

The proposed statutory language properly limits the exercise of police power to criminal violations occurring on military installations. This limitation is necessary because the courts are just as willing today to insure maintenance of the proper civilian-military relationships as in the years after the Civil War.[260] The Posse Comitatus Act[261] has

rarely been the subject of litigation until recently, when courts have closely reviewed and limited the utilization of military personnel to assist in law enforcement off post.[262] However, the Judge Advocates General of the Armed Forces have consistently opined that law enforcement on a military installation is the execution of laws for a military purpose and an exception to the Posse Comitatus Act.[263] As discussed earlier, at least one court has adopted this same position that law enforcement on a military installation is not a violation of the Act.[264] Therefore, the proviso that the statute is not to be interpreted as repealing any of the Posse Comitatus Act is inserted to specifically adopt current interpretations of the limits on the utilization of soldiers to execute the laws. The proviso thus insures that the proposed statute is accomodated under today's notions of the proper relationships between the civil and the military elements of governmental power.[265]

Guidance to Military Police and Their Legal Advisors

In Chapters II and III hereof, an examination of the legal rationales currently supporting the exercise of military police duties revealed that the rationales provided military police little guidance in accomplishing their mission to maintain law and order on military installations.[266] The proposed statutory language provides definitive guidance by specifically authorizing military police to conduct enforcement of both federal and state law on military installations. This specific grant of authority will obviate the need for reliance on anacharistic and incomplete citizen's arrest authority or the logically amorphous protection of government property or commander's authority rationales.[267] The specific grant

of authority will have the salient advantage of notifying the citizen who enters a military installation that the military police in fact have the authority that their garb and equipment merely implies they have today. The notice should avoid unwarranted resistance to military police arrests of civilians, thereby avoiding needless injury and death to both civilians and military police alike.[268] Finally, the statute will provide courts a specific standard against which the courts can test the military police conduct that is challenged.[269]

As time progresses, courts will develop in their opinions a complete body of law governing the exercise of the statutory grant of authority to military police. However, the statute as written does not require manual drafters and legal advisors to wait for these court opinions to obtain references and precedent to use as guidance for military police. By granting military police the same authority as U.S. Marshals and state sheriffs would exercise on the military installation, the statute itself adopts the entire criminal procedural law of both the United States and the state. Thus, a complete body of law, both state and federal,[270] will be adopted and govern such matters as when arrests can be made, the quantity and quality of force that may be used in various circumstances, the types of searches and seizures that can be made and other rules governing the conduct of police activities.[271]

A critical examination of the entire scope of criminal procedural rules that will become applicable to the conduct of law enforcement by military police upon adoption of the proposed statutory language is beyond the scope of this paper. However, it would appear that the Armed Forces could adopt by regulation as stated in the proposed statute, the already existing body of law contained in existing manuals governing law enforcement

by military police in relation to soldiers under the UCMJ. As noted throughout this discussion, courts have frequently upheld current military criminal procedural practices even when they differ significantly from civilian police practices approved by courts.[272] For example, courts have approved gate searches and seizures based on implied consent,[273] verbal authorizations to search issued by a commander based on oral evidence of probable cause[274] and the utilization of military necessity searches in restricted areas.[275] Today, courts appear willing to uphold military regulations that impact on a civilian's constitutional rights even in situations where similar laws and regulations have been struck down when implemented by state and local governments regarding civilian conduct.[276] It would appear that current military law enforcement practices are justifiable in the interests of national security when balanced against the citizen's interests in entering military installations.

The need for a uniform code of police conduct at military installations would support adopting current military police practices in relation to soldiers, particularly in light of the fact that these manuals are based in large measure on civilian court cases[277] or on military cases under the UCMJ which in turn rely on civilian law enforcement cases.[278] Although the adoption of current practices as described in the law enforcement manuals would require careful study, it would appear that the President or the Secretaries of the Services could, in accordance with the proposed statutory language and in consonance with the need for uniform law enforcement at military installations, issue regulations providing for uniform law enforcement practices in relation to both soldiers and civilians at military installations.

Compliance with Fourth Amendment Proscriptions

In Chapter IV the discussion exemplified that the legal rationales governing military police authority did not properly provide for effective law enforcement in light of the Fourth Amendment.[279] Further, the discussion concluded that these vague rationales, although upheld by courts, did not logically support invasions of Fourth Amendment rights of civilians by military police. The approval of military police conduct in many cases constituted an unwarranted and unjustifiable silent abrogation of a citizen's constitutional rights on the one hand, and subjected both the military police and the United States to possible civil liability on the other.[280]

The proposed statutory language clarifies the role of military police as proper agents of government to lawfully invade our citizen's privacy to conduct lawful arrests, searches incident to arrest, and searches and seizures of property. By granting military police only that authority that other statutory police and law enforcement agents possess, the Congress will also impose the restrictions placed by courts on police conduct. Thus, the full range of Fourth Amendment limitations on police conduct is by statute imposed on military police in their relations to civilians. Assuming that military police are properly trained and will obey these restrictions in the interest of maintaining law and order, the statute will have the beneficial effect of avoiding unlawful invasions of citizen's rights while at the same time providing for the successful prosecution of criminals and the insulation of both the law abiding military police and the government that employs them from unnecessary civil litigation.

Conclusion

In a recent bestselling book entitled The Mugging,[281] Morton Hunt makes the observation:

> To the patrolman or detective who has tracked down a criminal, the important thing is to arrest him and submit him to the courts along with sufficient evidence to convict him. . . . Left-wing cop-haters miss this obvious point: they see the police as having evil ends, whereas in fact most of those ends are good; it is the means the police use to achieve them that are often evil. Right-wing cop-lovers, on the other hand, see the police as having only good ends, and using means justified by them; but in fact the means the police use often do more damage to the moral fiber of society than their goals could ever warrant.[282]

Mr. Hunt's point is well taken when one views the situation of law enforcement on a military installation. Military police have a legitimate function to perform when they conduct law enforcement activities against civilians. However, as developed in this paper, in the absence of statutory police authority, the military police operate extra-legally to the detriment of the citizens the military police serve.

To require military police to accomplish a law enforcement agent's daily tasks is to require the government that employs the police and especially the elected representatives of the civilians who look to the police for protection from crime, to take those steps necessary to insure that the police have the necessary authority to effectively maintain law and order.[283] In the military community, the men and women who day to day confront civilian misconduct have inadequate legal authority to enforce valid laws and regulations. Without concrete guidance the military police may either overstep the bounds of lawful police conduct thereby violating a citizen's constitutional rights and subjecting themselves to the offer of violence, or later civil or criminal penalities, or they may hesitate to properly act and permit a criminal either to

escape punishment or cause injury or death to other citizens. Both these results are avoided today either because of the happenstance of civilian ignorance of the true authority of military police or because of the coincidence that anacharistic citizen's arrest laws happen to apply.

Courts, as a pragmatic matter, have to date, upheld military police conduct even though as a legal or logical matter the conduct was unlawful. One will perhaps never know whether these actions by the courts were possible only because the men and women who operate as military police were so well trained in limited interference with civilians that in the cases which the courts faced the police conduct was so reasonable as to require court approval. One can only speculate as to a court's reaction to a clear case of unreasonable conduct in a situation where the military police conduct is clearly outside the parameters of a lawful citizen's arrest.

What is clear, is that it is unconscionable for a society, which prides itself as a people who govern themselves by the rule of law, to subject its citizens to law enforcement conducted by persons to whom society has given no clear limitation on the exercise of police power. And worse yet, it is intolerable for a society to require its young men and women in the military to don the cloak of police authority and to require them to confront lawbreakers without providing them even the most rudimentary police powers to enforce the law. If the military is to properly accomplish its national security missions by operating military installations on which both military personnel and civilians are to live and work in safety, then the personnel assigned to police duties require a clear statutory statement of the authority they have to provide for that safety. Military police must not only look like police and act like police--

they must be police. In our system of government and in our legal tradition, if soldiers are to be police then they must be granted statutory law enforcement authority.

END NOTES

[1]U.S. Army Field Manual, 19-10, Military Police Operations (30 September 1976); U.S. Army Field Manual, 19-20, Investigations (29 April 1977).

[2]The term "manual" will be used in a generic sense to include all Department of Army documents other than regulations. Thus, a recent training circular, U.S. Army Training Circular, 19-22, Apprehension, Search and Seizure (30 June 1977) is included in the term.

[3]This study will concentrate on law enforcement activities which involve confrontations between military police and civilians. The term law enforcement activities is usually understood to include searches of buildings, investigations of crimes, interviewing witnesses, pursuit of escaped prisoners or felons, and searches of areas for suspected criminals. See United States v. Red Feather, 541 F.2d 1275, 1278 (8th Cir. 1976). As these types of law enforcement activities do not usually involve a personal intrusion on a suspect's constitutional rights or result in an offer of resistance by a suspect, they will not be specifically addressed herein. However, the need for military police to have statutory authority to conduct these activities is equally as strong as the need for statutory arrest authority.

[4]10 U.S.C.§§ 801-940 (1970); (hereinafter cited as UCMJ).

[5]U.S. Army Field Manual, 19-10, supra note 1 at para. 2-11; U.S. Army Field Manual, 19-20, supra note 1 at 9. U.S. Army Training Circular, 19-22, supra note 2 does not distinguish between law enforcement activities against civilians or soldiers. However, citations to U.S. Court of Military Appeals cases and references to UCMJ provisions imply that the circular was intended to apply to soldiers only. See discussion accompanying notes 9-12, infra.

[6]See discussion accompanying notes 69 and 156, infra.

[7]See, e.g. United States v. Banks, 539 F. 2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); United States v. Vaughn, 475 F. 2d 1262 (10th Cir. 1973); United States v. Burrow, 396 F. Supp. 890 (D. Md. 1975); United States v. Fox, 407 F. Supp. 857(W. D. Okla. 1975). See, Brancato, Base Commander Responses to Civilian Misconduct: Systems and Problems For The Staff Judge Advocate, 19 Air Force L. Rev. 111 (1977); Lee, Gateway Inspections: The Admissibility of Evidence Seized, 19 Air Force L. Rev. 139 (1977). Compare, Comment, The Criminal Law Enforcement Authority of Park Rangers in Proprietary Jurisdiction National Parks--Where Is It?, 13 Calif. Western L. Rev. 126 (1977).

[8]See discussion accompanying notes 163-169, infra.

[9]See discussion accompanying notes 109-122, infra.

[10]U.S. Army Reg. No. 600-40, Apprehension, Restraint, and Release to Civil Authorities (4 November 1974), para. 3a:

> All members of the Armed Forces, acting in a private capacity, have the ordinary right of citizens to assist in the maintenance of peace, including the right to apprehend suspected offenders. This right to make a "citizen's arrest" is governed by the substantive law applying at the particular locality, however, and care should be exercised to avoid exceeding the "citizen's arrest" authorization granted by the law of that locality.

[11]See discussion accompanying notes 123-145, infra.

[12]See discussion accompanying notes 182-187, infra.

[13]J. LEE, A HISTORY OF POLICE IN ENGLAND (London 1905) at Chaps. 10-12.

[14]P. LUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (1956) at 441.

[15]See, generally, II POLLACK AND MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD (2d Ed. 1899), for a thorough discussion of the development of tort doctrines by early courts in England. Later, common law courts recognized that a person has a right to resist an unlawful arrest, a term applied to the "seizure of a person, for the purpose of bringing him for trial before a court." The Queen v. Tovley, 92 Eng. Rep. 349 (K.B. 1710). See, Chevigny, The Right to Resist an Unlawful Arrest, 78 Yale L. J. 1128 (1969).

[16]W. RADIN, HANDBOOK ON ANGLO-AMERICAN LEGAL HISTORY (1936), at 219-247.

[17]P. LUCKNETT, supra note 14 at 441; See, generally, T. GURR, P. GRABOSKY AND R. HULA, THE POLITICS OF CRIME AND CONFLICT (1977) at 35-213, 702-703, and 706-707.

[18]The proliferation of courts with varying types of jurisdiction over both criminal and civil matters continued until 1873 when Parliament, in an effort to simplify the system, passed the Judicature Act. RADIN, supra note 16 at 197; GURR, supra note 17 at 88-89.

[19]GURR, supra note 17 at 725-746.

[20]Chevigny, supra note 15 at 1135; 2 HALE, PLEAS OF THE CROWN (1st Amer. Ed. 1847) at 96.

[21]GURR, supra note 17 at 35-44; G. CHANDLER, THE POLICEMAN'S ART (1974) at 14.

[22]P. LUCKNETT, supra note 14 at 424-441; CHANDLER, supra note 21 at Chap. 1.

[23]See, e.g., Rex v. Boatie, 2 Burr 864 (K.B. 1759).

[24]2 HALE, supra note 20 at 96.

[25]Cf., GURR, supra note 17 at 702-707.

[26]CHANDLER, supra note 21 at 14.

[27]Warner, Investigating the Law of Arrest, 26 A.B.A. L.J. 151, 152 (1940).

[28]Chevigny, supra note 15.

[29]Id. See generally Manos, Police Liability for False Arrest or Imprisonment, 16 Clev. Mar. L. Rev. 415 (1967).

[30]R. LINBERRY, JUSTICE IN AMERICA (1972), at Chap. 1.

[31]Id.

[32]P. LUCKNETT, supra note 14, at 424-441; RADIN, supra note 16.

[33]M. FREIDMAN, A HISTORY OF AMERICAN LAW (1973) at 208-264.

[34]Id.

[35]Id.

[36]Id. at 318-322.

[37]Id. at 321.

[38]Id. at 504.

[39]F. WIENER, CIVILIANS UNDER MILITARY JUSTICE (1967), at 92-164.

[40]FREIDMAN, supra note 33.

[41]FREIDMAN, supra note 33 at 504.

[42]For a compilation of references to state statutes providing police arrest powers see, ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 2.02, Comment at 95-97, Commentary on Article 3, at 106, and Appendix II, at 224 (Tent. Draft No. 1, 1966) and (Proposed Official Draft 1975).

[43]See, Wilgus, Arrest Without A Warrant, 22 Mich. L. Rev. 541, 545-552 (1924); L. WADDINGTON, ARREST, SEARCH AND SEIZURE (1974) at 8; J. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965).

[44]FREIDMAN, supra note 33 at 504.

[45]WIENER, supra note 39 at 6.

[46]WIENER, supra note 39 at 12.

[47]WIENER, supra note 39 at Appendix IV.

[48]WIENER, supra note 39 at 6.

[49]WIENER, supra note 39 at 12.

[50]E. BYRNE, MILITARY LAW (1970) at 8.

[51]W. WINTHROP, MILITARY LAW AND PRECEDENTS (Reprint 1920) at 947-953.

[52]WIENER, supra note 27 at 4.

[53]BYNE, supra note 50.

[54]71 U.S. (Wall) 121 (1872).

[55]Act of Sept. 24, 1789, Ch. [illegible], 1 Stat. 87.

[56]See State v. Kelly, 76 Me. 331 (1884); 2 CORPUS JURIS SECUNDUM, CRIMES § 316 (1974 Rev.); G. GOODRICH, CONFLICTS OF LAW (4th Scoles Ed. 1964) at 18.

[57]FRIEDMAN, supra note 33 at 502-524. See U.S. Dept. Army Pam. 27-21, Military Administrative Law Handbook (1973) at Chap. 6 (hereinafter cited as ADMINISTRATIVE LAW HANDBOOK). U.S. Marshals were established by Congress as early as 1789 by Act of Sept. 24, 1789, Chap. 20, § 27, 1 Stat. 87.

[58]FREIDMAN, supra note 33 at 502-524. See, G. GLENN AND A. SCHILLER, THE ARMY AND THE LAW (1971) at 14, 18-20.

[59]See discussion accompanying note 14, supra.

[60]See Furman, Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. T. Rev. 85, 92-96 (1960); 5 Cong. Rec. 2112 (1877).

[61]GLENN, supra note 58 at 18-20.

[62]For a comprehensive review of the events leading to the Congressional ban on utilizing the Army to execute civil power, see Weeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. T. Rev. 83 (1975).

[63]Id. at 86-93.

[64]18 U.S.C. § 1385 (1970). For a comprehensive study of the Act and significant legal issues it raises, see Weeks, supra note 62. While the Department of the Navy is not included in the Act per se, law enforcement activities not in the high seas, are governed by the Act by direction of the Secretary of Navy, SECNAVINST 5400, 12A (12 March 1975). See United States v. Walden, 490 F. 2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974).

[65]71 U.S. (4 Wall) 121 (1872).

[66]Weeks, supra note 62 at 91; GLENN AND SCHILLER, supra note 58 at 18-20.

[67]U.S. ARMY MILITARY POLICE SCHOOL PAMPHLET, HISTORY OF CORPS OF MILITARY POLICE (1953), at 3.

[68]Id. at 1-6.

[69]See discussion accompanying notes 123-145, 182-187, 238-248, infra.

[70]539 F. 2d 14, 16 (9th Cir.), cert. denied, 429 U.S. 1024 (1976).

[71]The actual persons accosting the civilian were Air Force personnel from the Office of Special Investigations. These OSI agents are equivalent to Army Criminal Investigation Command agents, who are responsible for the investigation of serious crimes. See U.S. Army Reg. No. 195-2, Criminal Investigation Activities (6 May 1977).

[72]United States v. Banks, 539 F. 2d at 16.

[73] Id.

[74] Id.

[75] See Furman, supra note 60 at 86; United States v. Walden, 490 F. 2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974).

[76] See Weeks, supra note 62 at 124-126.

[77] For a general discussion of the enforcement of law at military installations, see ADMINISTRATIVE LAW HANDBOOK at 6-114 to 6-175. The Secretary of the Army has by regulation established a scheme of law enforcement which emphasizes the shared responsibility for law enforcement between military personnel and state and federal law enforcement agents. See, U.S. Army Reg. No. 195-2, supra note 71.

[78] REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, PART II (JUNE 1957) at 103; (hereinafter cited as JURISDICTION REPORT).

[79] JURISDICTION REPORT at 86.

[80] JURISDICTION REPORT at 15-19.

[81] Id.

[82] The first draft of Article I, Section 8, Clause 17 was submitted by proposal of Mr. Charles Pinckney, of South Carolina in 1787. JURISDICTION REPORT at 18.

[83] See Altiere, Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation, 72 Mil. T. Rev. 55, 57-60 (1976).

[84] Article I, Section 8, Clause 17, U.S. Constitution.

[85] JURISDICTION REPORT at 108.

[86] Compare 18 U.S.C. § 1111, 1112, 1113 (1970) with 18 U.S.C. § 13 (1970).

[87] 18 U.S.C. § 3052 (1970).

[88] 18 U.S.C. § 3053 (1970).

[89] ADMINISTRATIVE LAW HANDBOOK AT 6-31 to 6-143; Altiere, supra note 83 at 61-70.

[90]U.S. Army Reg. No. 405-20, Federal Legislative Jurisdiction (1 August 1973) at 3.

[91]JURISDICTION REPORT at 117.

[92]U.S. Army Reg. No. 195-2, supra note 72 at 3-1 to 3-6; U.S. Army Reg. No. 190-29, Minor Offenses and Uniform Violation Notices Referred to U.S. District Courts (17 June 1977).

[93]U.S. Army Reg. No. 405-20, supra note 90 at 3.

[94]JURISDICTION REPORT at 126.

[95]Id.

[96]See discussion accompanying note 91 supra.

[97]U.S. Army Reg. No. 405-20, supra note 90 at 3.

[98]See, e.g., Minn. Stat. Ann. § 1.1041 (1977) providing for grant of concurrent jurisdiction over federal lands in the state. Compare Paul v. United States, 371 U.S. 245 (1963).

[99]U.S. Army Reg. No. 405-20, supra note 90 at 3.

[100]See Papcun, Proprietary Jurisdiction, 8 Jag. L. Rev. 117 (1971); Compare, Comment, The Criminal Law Enforcement Authority of Park Rangers in Proprietary Jurisdiction National Parks--Where is It?, 13 Calif. Western L. Rev. 126 (1977).

[101]ADMINISTRATIVE LAW HANDBOOK at 6-40 to 6-41.

[102]Id. at 6-39.

[103]Sewell, The Government as a Proprietor of Land, 35 Tenn. L. Rev. 287 (1968).

[104]See Brancato, supra note 7; Franks, Prosecution in Civil Courts of Minor Offenses Committed on Military Installations, 53 Mil. L. Rev. 137 (1971); Peck, The Use of Force to Protect Government Property, 26 Mil. L. Rev. 81 (1964); Suter, Juvenile Delinquency on Military Installations, U.S. Dept. Army Pamphlet 27-50-4, The Army Lawyer, (July 1975) at 3.

[105]ADMINISTRATIVE LAW HANDBOOK at 6-157.

[106]See discussion accompanying note 5, supra, and materials cited.

[107]See discussion accompanying note 92, supra, and materials cited.

[108]Soldiers, just as any citizen, could be deputized under state law to assist local police. However, if such action was for the direct purpose of executing the laws of the state on behalf of the state officials at the installation, where state law is applicable, some writers believe that the Posse Comitatus Act would be violated. See Peck, supra note 104 at 108; ADMINISTRATIVE HANDBOOK at 6-156. But see Weeks, supra note 62 at 124-127, where the author contends that the military purpose exception to the Act would support use of deputized soldiers to maintain law and order at military installations.

[109]See 2 OP. ATT'Y GEN. 575 (1833) in which the Honorable Roger B. Taney stated: "Indeed, it can hardly be supposed by anyone that the United States have not the same right that any individual possesses to defend their lawful possessions, by force, against a trespasser."

[110]WINTHROP, supra note 31 at 234.

[111]JAGA 1952/8326, 3 Dec. 1952, 3 Dig. Ops. § 23.1, Posts, Bases and Other Installations, at 637.

[112]United States v. Vaughn, 475 F. 2d 1262 (10th Cir. 1973).

[113]See ACLU STUDY, THE NATIONAL GUARD AND THE CONSTITUTION (1971) (on file at ACLU, 156 Fifth Avenue, N.Y. N.Y. 10010), (hereinafter cited as ACLU STUDY).

[114]Department of Defense Directive 3025.12, para V (4 December 1973).

[115]ACLU STUDY supra note 112.

[116]367 U.S. 886 (1961).

[117]OPJAGN 1962/418, 10 Oct. 1962, 13 Dig. Ops., Posts, Bases, and Other Installations, § 29.1, at 225.

[118]JAGA 1958/5147, 10 July 1958, 8 Dig. Ops., Posts, Bases, and Other Installations, § 29.1, at 225. This rationale has been broadly interpreted to authorize commanders to take a variety of actions. See e.g., DAJA-AL 1975/4177, 9 July 1975; DAJA-AL 1977/3534, 8 March 1977; JAGA 1958/5147, 10 July 1958, 8 Dig. OPS., Posts, Bases and Other Installations, § 23.5 at 273; JAGA 1954/8177, 30 September 1954, 4 DIG. OPS, Search and Seizure, § 7.7, at 179.

[119]See e.g., United States v. Banks, 539 F. 2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976).

[120]DAJA-AL 1973/5135, 16 November 1973 (The Judge Advocate General of the Army concluded that a commander could order a search of automobiles leaving an installation over the owners objection where there had been a wave of burglaries. However, no opinion was presented as to the admissibility of the evidence in a criminal trial).

[121]United States v. DiRe, 332 U.S. 594 (1945).

[122]U.S. Army Reg. No. 600-40, supra note 10.

[123]332 U.S. 594 (1945).

[124]U.S. Army Reg. No. 600-40, supra note 10.

[125]See. 5 Am Jur 2d, § 35, Arrest (1977) at 727.

[126]Id.

[127]Id. at 728. See, e.g. Texas Code of Criminal Procedure Art. 14.01 (1954).

[128]473 F. 2d 660 (9th Cir. 1973).

[129]Green v. James, 473 F. 2d 660, 662 (9th Cir. 1973). The regulation cited by the court was the predecessor to U.S. Army Reg. No. 600-40, supra note 10.

[130]Green v. James, 473 F. 2d 660, 662 (9th Cir. 1973).

[131]Id.

[132]See, e.g., Missouri Stat. Annot. § 304.10 (Vernon's 1972).

[133]See, e.g., Missouri Stat. Annot. § 559.470 (Vernon's 1972).

[134]See, e.g., Missouri Stat. Annot. § 560-240 (Vernon's 1972).

[135]Id.

[136]See, e.g., Missouri Stat. Annot. § 564.100 (Vernon's 1972).

[137]See discussion accompanying notes 84-92, 97-98, and 101-104, supra.

[138]Cf. ADMINISTRATIVE LAW HANDBOOK at 6-90 to 6-94.

[139]See discussion accompanying notes 125-127, supra.

[140]See, e.g., Kansas Code Crim. Proc. § 22-2401 (1974); N.Y. Crim. Proc. Law § 140.10 (1970); Texas Code Crim. Proc. Art. 14.01 (1954).

[141]As a general rule, criminal procedure established by state law is not applicable to military installations by virtue of the Assimilative Crimes Act. Rather, federal rules of criminal procedure contained in Title 18, United States Code are applicable to law enforcement in areas of Exclusive Legislative Jurisdiction. See, Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Hockenberry v. United States, 422 F. 2d 171 (9th Cir. 1970); McCoy v. Pescor, 145 F. 2d 260 (8th Cir. 1944), cert. denied 324 U.S. 868 (1945). However, there is no federal statute permitting a citizen to arrest for a violation of a federal criminal statute. As noted previously, in United States v. DiRe, 332 U.S. 594 (1945), the Supreme Court directed use of applicable state law in such case. When dealing with an area under the Exclusive Jurisdiction of the United States, the issue is then raised--current state law or the law as it was at the time Exclusive Jurisdiction was acquired? Cf. Arlington Hotel Co. v. Faut, 278 U.S. 439 (1929); Chicago, Rock Island & Pacific Ry. v. McGlinn, 114 U.S. 542 (1885).

[142]U.S. Army Reg. No. 600-40, supra note 10. Compare Paul v. United States, 371 U.S. 245 (1963).

[143]See discussion accompanying notes 221-249, infra.

[144]"The overwhelming majority of offenses committed by civilians on areas under the exclusive jurisdiction of the United States are petty misdemeanors (e.g., traffic violations, drunkenness)". JURISDICTION REPORT at 135.

[145]Papcun, supra note 100 at 118.

[146]See discussion accompanying notes 174-184, infra.

[147]THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE--THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) at 106.

[148]10 U.S.C. § 801-940 (1970).

[149]L. WADDINGTON, supra note 43 at 8.

[150]For a comprehensive listing and discussion of state and federal statutes establishing rules of criminal procedure, see ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, supra note 42.

[151]See, Oaks, Studying the Exclusionary Rule in Searches and Seizures, 37 U. Chi. T. Rev. 665 (1970); Griswold, Criminal Procedure 1969--Is It a Means or an End?, 29 Md. T. Rev. 307, 308 (1969).

[152]232 U.S. 383 (1914).

[153]Chambers v. Mahroney, 369 U.S. 42 (1970); Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56 (1950); Trupiano v. United States, 334 U.S. 699 (1948); Harris v. United States, 331 U.S. 145 (1947).

[154]For a general discussion of court opinions dealing with military police functions at military installations see Brancato, supra note 7; Peck, supra note 104; Suter, supra note 104; ADMINISTRATIVE LAW HANDBOOK at 6-154 to 6-164.

[155]United States v. Banks, 539 F. 2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); Green v. James, 473 F. 2d 660 (9th Cir. 1973); Weissman v. United States, 387 F. 2d 271 (10th Cir. 1967); United States v. Mathews, 431 F. Supp. 70 (W.D. Okla. 1976).

[156]United States v. Ellis, 547 F. 2d 863 (5th Cir. 1977); Wallis v. O'Kier, 491 F. 2d 1323 (10th Cir.), cert. denied, 419 U.S. 90 (1974); United States v. Vaughn, 475 F. 2d 1262 (10th Cir. 1973); Saylor v. United States, 374 F. 2d 894 (Ct. of Cl. 1967); United States v. Grisby, 335 F. 2d 652 (4th Cir. 1964); United States v. Crowley, 9 F. 2d 927 (D. Ga. 1922); United States v. Fox, 407 F. Supp. 857 (W.D. Okla 1975); United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975); United States v. Burrow, 396 F. Supp. 890 (D. Md. 1975).

[157]Henry v. United States, 361 U.S. 98 (1959). The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[158]See, Wilgus, supra note 43.

[159]2 HALE, supra note 20 at 72.

[160]Wilgus, supra note 43 at 545-552.

[161]Id.

[162]Id. at 541. For a comprehensive discussion of the law of arrest see L. WADDINGTON, supra note 43; LAFAVE, supra note 43; Cook, Probable Cause to Arrest, 24 Vand. L. Rev. 317 (1971); Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942).

[163]See Gilligan, Search of Premises, Vehicles, and the Individual Incident to Apprehension, 61 Mil. T. Rev. 89 (1973).

[164]See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, supra note 42 at Appendices IX, X and XI, pages 686-697.

[165]See Title 18, United States Code § 3000 et. seq. (1970).

[166]See Gilligan, supra note 163; 3 DOOLEY MODERN TORT LAW (1977) at Chap. 42.

[167]See L. WADDINGTON, supra note 43 at 8.

[168]3 DOOLEY, supra note 166 at 194.

[169]See Gilligan, supra note 166 at 104-106.

[170]Kerr v. Illinois, 119 U.S. 436, 440 (1886).

[171]Id.

[172]Carrol v. United States, 267 U.S. 132 (1925). See, Terry v. Ohio, 392 U.S. 1 (1968); Chimel v. California, 395 U.S. 752 (1969).

[173]HALSBURY'S LAWS OF ENGLAND (3d. Ed. SIMMONS) at 356.

[174]See Chimel v. California, 395 U.S. 752 (1964); Montgomery v. United States, 403 F. 2d 605 (8th Cir. 1968); Ward v. United States, 316 F. 2d. 420 (10th Cir.), cert. denied, 375 U.S. 826 (1963).

[175]See, e.g., United States v. Viale, 312 F. 2d 595 (2nd Cir. 1963). See discussion accompanying notes 176-184, infra.

[176]264 F. Supp. 804 (S.D.N.Y. 1967).

[177]390 F. 2d 101 (5th Cir. 1968).

[178]Alexander v. United States, 390 F. 2d at 105. The statute governing the duties of postal inspectors was the predecessor to the current statute, 18 U.S.C. § 3061 (1970), which was codified in 1970 to clarify that postal inspectors have the authority to arrest persons for violations of postal laws and regulations.

[179] Id.

[180] 332 U.S. 594 (1945).

[181] See, Ward v. United States, 316 F. 2d 113, 118 (9th Cir.), cert. denied, 375 U.S. 862 (1963); Wron v. United States, 325 F. 2d 420 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964); United States v. Helbork, 76 F. Supp. 985, 986 (D. Ore. 1948).

[182] United States v. Haw Won Lee, 264 F. Supp. 804 (S.D. N.Y. 1967); Alexander v. United States, 390 F. 2d 101 (5th Cir. 1968). See text accompanying notes 174-178, supra and notes 182-183, infra.

[183] 312 F. 2d 595 (2nd Cir. 1963).

[184] See, United States v. Chapman, 325 F. 2d 420 (9th Cir. 1963) and Dorsey v. United States, 1974 F. 2d 899 (5th Cir), cert. denied, 338 U.S. 950 (1949), cert denied, 340 U.S. 878 (1950) (Florida); Montgomery v. United States, 403 F. 2d 605 (8th Cir. 1968) (Missouri).

[185] See discussion accompanying notes 177-179, supra.

[186] See discussion accompanying notes 175-176, supra.

[187] See discussion accompanying notes 180-186, supra.

[188] 431 F. Supp. 70 (W.D. Okla. 1976).

[189] Installation commanders are directed to maintain a comprehensive traffic and motor vehicle safety program. See U.S. Army Reg. No. 190-5, Motor Vehicle Traffic Supervision (1 August 1973). Routine traffic safety stops of motor vehicles are a principle method used by installation commanders to assure motorists' motor vehicles are properly licensed and registered. See, JAGA 1958/5147, 10 July 1958, 8 Dig. Ops. § 25.9 Posts, Bases and Other Installations, 225; JAGA 1956/8555, 26 November 1956, 7 Dig. Ops., § 81.5, Army at 6.

[190] The doctrine known as "Fruit of the Poisonous Tree" provides that once police unlawfully violate a citizen's constitutional rights and obtain information, they may not use that information in a later lawful law enforcement activity. In such a case, any evidence obtained in the later lawful activity is inadmissible in a criminal trial. For a comprehensive treatment of the doctrine, see Chevigny, Police Abuses in Connection with the Law of Search and Seizures, 5 Crim. L. Bull. 3 (1969); E. MAQUIRE, EVIDENCE OF GUILT (1959) at 221.

[191]Adams v. Williams, 407 U.S. 143 (1971); Terry v. Ohio, 392 U.S. 1 (1968). See, Schneckloth v. Bustamonte, 412 U.S. 218 (1965).

[192]333 U.S. 10, 17 (1948).

[193]Alexander v. United States, 390 F. 2d 101, 105 (5th Cir. 1968).

[194]See Ward v. United States, 316 F. 2d 113, 118 (9th Cir.), cert. denied, 375 U.S. 862 (1963); Wron v. United States, 325 F. 2d 420 (10th Cir. 1963), cert. denied, 377 U.S. 946 (1964); United States v. Helbork, 76 F. Supp. 985 (D. Ore. 1948).

[195]See discussion accompanying notes 33-43, supra.

[196]539 F. 2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976).

[197]10 U.S.C. § 809 (1970). The statute defines arrest as the term is used in military law to reflect pre-trial restraint, in the nature of pre-trial confinement, in an offenders own quarters for example. The court more probably meant to reference 10 U.S.C. § 807 (1970) dealing with apprehension. Each of the statutory Articles are limited in scope to persons subject to the UCMJ by use of the language: "a person subject to this chapter." Except in time of war or national emergency when courts would be closed, civilians are not persons subject to the UCMJ. See Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

[198]For a comprehensive discussion of the history of this statute and legal issues involving barring civilians from a military installation, see Comment, Unlawful Entry and Re-Entry Into Military Reservations In Violation of 18 U.S.C. § 1382, 53 Mil. T. Rev. 137 (1971).

[199]For a discussion of the nature of pre-arraignment statutes and the purposes of pre-arraignment procedures, see ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES, supra note 42 at 289-315. It is noteworthy that throughout the discussion there is not a single reference to a substantive crime statute as a basis for an arrest or apprehension, even in an historical perspective.

[200]See discussion accompanying notes 15-25, supra.

[201]340 F. 2d 891, 894-895 (2d Cir. 1965).

[202]See L. Waddington, supra note 43 at 1-33.

[203]Chambers v. Maroney, 399 U.S. 42 (1970).

[204]See, United States v. Ellis, 547 F. 2d 863 (5th Cir. 1977).

[205]396 F. Supp. 890 (D. Md. 1975).

[206]United States v. Burrow, 396 F. Supp. at 896. U.S. Army Reg. No. 210-10, Installations (16 September 1974) is the basic regulation concerning an installation commander's duty to maintain law and order. It contains at para. 15a, a complete statement of the rules and regulations concerning the conduct of searches and seizures against civilians. See ADMINISTRATIVE LAW HANDBOOK at 6-159 to 6-164.

[207]United States v. Burrow, 396 F. Supp. at 903. See, United States v. Banks, 539 F. 2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); Wallis v. O'Kier 491 F. 2d 1323 (10th Cir., 1974), cert. denied 419 U.S. 90 (1975); United States v. Rogers, 388 F. Supp. 298 (E.D. Va. 1975).

[208]United States v. Ellis, 547 F. 2d 863 (5th Cir. 1977); United States v. Vaughn, 475 F. 2d 1262 (10th Cir. 1973); United States v. Crowley, 9 F. 2d 927 (N.D. Ga. 1922).

[209]Id.

[210]50 U.S.C. § 797 (1970); U.S. Army Reg. No. 380-20, Restricted Areas (12 September 1973) at para. 6. See ADMINISTRATIVE LAW HANDBOOK at 6-121 to 6-122.

[211]United States v. Vaughn, 475 F. 2d 1262 (10th Cir. 1973); United States v. Fox, 407 F. Supp. 857 (W.D. Okla. 1975); United States v. Rogers, 388 F. Supp. 298 (E. D. Va. 1975).

[212]United States v. Ellis, 547 F. 2d 863 (5th Cir. 1977); United States v. Banks, 539 F. 2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); Wallis v. O'Kier, 491 F. 2d 1323 (10th Cir. 1974); United States v. Burrow, 396 F. Supp. 890 (D. Md. 1975).

[213]Weissman v. United States, 387 F. 2d 271 (10th Cir. 1967); United States v. Mathews, 431 F. Supp. 70 (W.D. Okla. 1976); United States v. Camacho, 506 F. 2d 594 (9th Cir. 1974).

[214]Wallis v. O'Kier, 491 F. 2d 1323 (10th Cir. 1974); United States v. Grisby, 335 F. 2d 652 (4th Cir. 1964).

[215]See discussion accompanying notes 238-255, infra.

[216]For a comprehensive discussion of a citizen's right to resist an unlawful arrest, see Chevigny, supra note 15; Comment, The Right to Resist an Unlawful Arrest, 7 Natural Resources J. 119 (1967).

[217]See Note, The Right to Resist an Unlawful Arrest: Judicial and Legislative Overreaction?, 10 Akron T. Rev. 177 (1976).

[218]United States v. DiRe, 332 U.S. 581, 594 (1948); John Bad Elk v. United States, 177 U.S. 529 (1900); United States v. Heliczer, 373 F. 2d 241, 248 (2d Cir. 1967).

[219]See, e.g., State v. Mulvill, 57 N. J. 151, 156, 270 A. 2d 277, 279 (1970). The trend is to prohibit citizens from offering resistance even if the arrest is unlawful. See Note, The Right to Resist an Unlawful Arrest: Judicial and Legislative Overreaction? 10 Akron T. Rev. 172 (1976); Warner, The Uniform Arrest Act, 28 Va. T. Rev. 315, 345 (1942).

[220]Drurey v. Lewis, 200 U.S. 1 (1906); Stepp v. United States, 207 F. 2d 909 (4th Cir. 1953), cert. denied, 347 U.S. 933 (1954); State of Oklahoma v. Willingham, 143 F. Supp. 445 (E. D. Okla. 1956).

[221]Annot., Right to Resist Excessive Force Used in Accomplishing Lawful Arrest, 77 ALR 3d 281 (1977); Note, The Right to Resist an Unlawful Arrest: Judicial and Legislative Overreaction? 10 Akron T. Rev. 172, 177 (1976).

[222]Comment, The Right to Resist an Unlawful Arrest, 119, 124-125 (1967).

[223]Drurey v. Lewis, 200 U.S. 1 (1906); Stepp v. United States, 207 F. 2d 909 (4th Cir. 1953), cert. denied, 347 U.S. 933 (1954); Tastor v. United States, 124 F. Supp. 548 (N. D. Cal. 1954); Cerri v. United States, 80 F. Supp. 831 (N. D. Cal. 1946); Brown v. Cain, 56 F. Supp. 56 (E. D. Pa. 1944).

[224]See, Annot., Modern Status of Rules as to Right to Forcibly Resist Illegal Arrest, 44 ALR 3d (1972).

[225]See Warner, supra note 219 at 345.

[226]Note, The Right to Resist an Unlawful Arrest: Judicial and Legislative Overreaction?, 10 Akron T. Rev. 172, 177 (1976).

[227]Id. at 178.

[228]Chevigny, supra note 15 at 1147.

[229]Id. at 1148; Warner, supra note 219 at 345.

[230]Id.

[231]See discussion accompanying notes 238-255, infra.

[232]United States v. DiRe, 332 U.S. 581, 594 (1948); United States v. Heliczer, 373 F. 2d 241, 248 (2d Cir. 1967).

[233]See discussion accompanying notes 226-227, supra.

[234]See discussion accompanying notes 238-249, infra.

[235]See discussion accompanying notes 250-255, infra.

[236]See discussion accompanying notes 238-249, infra.

[237]See discussion accompanying notes 250-255, infra.

[238]28 U.S.C. § 2680 (Supp. IV 1975). For a comprehensive discussion of the Federal Tort Claims Act, see Borger, Gitenstein and Verkuil, The Federal Tort Claims Act Intentional Tort Amendment: An Interpretive Analysis, 54 N.C.L. Rev 496 (1976); L. JAYSON, HANDLING FREDERAL TORT CLAIMS (1974).

[239]DATA-AL 1974/4278, 20 May 1974.

[240]In Re Neagle, 135 U.S. 1 (1890); Drurey v. Lewis, 200 U.S. 1 (1906); Barr v. Mateo, 360 U.S. 564 (1959); Scherer v. Morrow, 401 F. 2d 204 (7th Cir. 1968), cert. denied, 343 U.S. 1084 (1969).

[241]See discussion accompanying notes 220-223, supra, and materials cited.

[242]80 F. Supp. 831 (N.D. Cal. 1946).

[243]Id. See Jaffe, Suits Against the Government and Officers: Damage Actions, 77 Harv. L. Rev. 209, 218-219 (1973).

[244]28 U.S.C. § 2684 (1970).

[245]See e.g., Massachusetts Binding & Ins. Co. v. United States, 352 U.S. 128 (1956).

[246]See 3 DOOLEY, MODERN TORT LAW (1977) at Chap. 42.

[247]Id. at 180.

[248]Id. at 180-206.

[249]See discussion accompanying notes 158-198, supra.

[250]See, e.g., Butler v. United States, 365 F. Supp. 1035 (D. Haw. 1973). When both the military police and the United States are named as defendants in the suit, recovery is only collectable against one or the other. Similarly if the plaintiff seeks recovery against the United States, it cannot seek indemnification from the individual military police man or woman. See 28 U.S.C. § 2676 (1970); Gilman v. United States, 347 U.S. 507 (1954).

[251]3 Dooley, supra note 246 at 201-204.

[252]See, e.g., Brown v. Cain, 56 F. Supp. 56 (E. D. Pa. 1944); Restatement of Torts §§ 140-144 (1954); Fobbs v. City of Los Angeles, 154 Cal. App. 2d 464, 316 P. 2d 668 (1957). The defense of justification applies only when the cause of action alleges the torts of False Arrest or Assault and Battery. If the plaintiff complains that his constitutional rights have been violated, the defense of justification is not alone sufficient to insulate the military police from liability. In such case liability can only be avoided by showing that the arrest or search and seizure was justified but also that the action taken was in good faith in pursuance of a reasonable police program. See Bivens v. Six Unknown Narcotics Agents, 456 F. 2d 1339 (2nd Cir. 1972); Jaffe, supra note 243 at 218; Zillman, The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act, 76 Mil. T. Rev. 1, 28-29 (1977).

[253]See, e.g., United States v. Ellis, 547 F. 2d 863 (5th Cir. 1977); United States v. Vaughn, 475 F. 2d 1262 (10th Cir. 1973); Brown v. Cain, 56 F. Supp. 56 (E. D. Pa. 1944).

[254]See, e.g., Wallis v. O'Kier, 491 F. 2d 1223 (10th Cir) cert. denied, 419 U.S. 90 (1974); Stepp v. United States, 207 F. 2d 909 (4th Cir. 1953), cert. denied, 347 U.S. 933 (1954); Lewis v. United States, 194 F. 2d 689 (3d Cir. 1952); United States v. Mathews, 431 F. Supp. 70 (W. D. Okla. 1976); Taster v. United States, 124 F. Supp. 548 (N. D. Calif. 1954).

[255]See, e.g., Stepp v. United States, 207 F. 2d 909 (4th Cir. 1953), cert. denied, 347 U.S. 933 (1954).

[256]See discussion accompanying notes 79-108, supra.

[257]See 40 U.S.C. §§ 13n. and 318d. (1970).

[258]While Title 18, United States Code contains criminal procedural and substantive statutes pertaining to the United States, its officers and land under the control of the United States, the proposed statute appears better suited to Title 10, United States Code. Title 10 contains all statutory authority of officers and military personnel of the Armed Forces.

[259]See U.S. Code & Cong. News Service, P. L. 94-458 (1976), at 4290-4294.

[260]See discussion accompanying notes 57-68, supra.

[261]18 U.S.C. & 1385 (1970).

[262]United States v. Walden, 490 F. 2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974); United States v. Red Feather, 392 F. Supp. 916 (D. S. D. 1975); Hubert v. Oklahoma, 504 P. 2d 1245 (Okla. Crim. App. 1972); Hildebrant v. Oklahoma, 507 P. 2d 1323 (Okla. Crim. App. 1973); Lee v. Oklahoma, 513 P. 2d 125 (Okla. Crim. App. 1973).

[263]See Weeks, supra note 62 at 91.

[264]See United States v. Banks, 539 F. 2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976).

[265]Id.

[266]See discussion accompanying note 148, supra.

[267]See discussion Chaps. III and IV, supra.

[268]See discussion accompanying notes 221-231, supra.

[269]See discussion accompanying note 148, supra.

[270]See discussion accompanying notes 258-259, supra.

[271]By permitting the President and the Secretaries of the Military Departments to enact regulations, the proposed statute would permit the adoption of current regulations, manuals and other guidance currently applicable only to soldiers who commit crimes cognizable under the UCMJ. Since these rules find their source in Federal law and court opinions applicable to civilians tried in either the federal or state courts, they may be made applicable to civilians who commit crimes at military installations. Further, many of the rules of procedure which are peculiar to the military criminal practice have been held valid when applied to civilians who enter military installations. See, e.g., United States v. Burrow, 396 F. Supp. 890 (D. Md. 1975); and see discussion accompanying notes 274-276, infra. Should the proposed statute be adopted, military criminal practice should be studied to determine whether it can be adopted by regulation in order to secure the advantage of having military police learn only one legal system. Compare discussion accompanying notes 258-278, supra.

[272] Id.

[273] See discussion accompanying notes 208-209, supra.

[274] See discussion accompanying notes 205-207, supra.

[275] See discussion accompanying notes 210-212, supra.

[276] Zillman and Imwinklereid, Constitutional Rights and Military Necessity: Reflections on the Society Apart, 51 Notre Dame Lawyer 396 (1976); Corrigan and Rose, The First Amendment--Revisted, The Army Lawyer, January 1976 at 1; Corrigan, The Lonely Flower: Command Control of Civilian Activities at Military Installations after Greer v. Spock, The Army Lawyer, June 1976 at 1.

[277] See discussion accompanying notes 5-12, supra.

[278] See, Gilligan, supra note 163.

[279] See discussion accompanying notes 149-220, supra.

[280] See discussion accompanying notes 221-255, supra.

[281] M. Hunt, The Mugging (1972).

[282] Id., at 80.

[283] See BYRNES, GOVERNMENT AGAINST THE PEOPLE (1946) at 259.

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